SUPREME COURT, U. S.

MAY 29 1974

MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

## No. 73-1790

SAN DIEGO GAS AND ELECTRIC COMPANY,
*Petitioner,*

vs.

FEDERAL POWER COMMISSION,
*Respondent,*

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JOHNS-MANVILLE PRODUCTS CORP.
GENERAL MOTORS CORP.
TUCSON GAS AND ELECTRIC CO.
SHELL OIL COMPANY
SOUTHERN UNION GAS CO.
SOUTHWEST GAS CORP.
SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT
EL PASO NATURAL GAS COMPANY
ARIZONA PUBLIC SERVICE CO.
SOUTHERN CALIFORNIA EDISON CO.
PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
AMERICAN SMELTING AND REFINING CO., ET AL.,
*Intervenors.*

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## PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit

---

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May 24, 1974

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PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
AMERICAN SMELTING AND REFINING CO., ET AL.,
*Intervenors.*

## PETITION FOR A WRIT OF CERTIORARI

### to the United States Court of Appeals for the District of Columbia Circuit

The petitioner, SAN DIEGO GAS & ELECTRIC COMPANY, respectfully prays that a writ of certiorari issue to review

the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on January 21, 1974.

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## OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix. The opinion (No. 634) and supplementary opinion (No. 634-A) of the Federal Power Commission also appear in the Appendix and are reported at 48 FPC Reports 931 and 48 FPC Reports 1369.

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## JURISDICTION

The opinion of the Court of Appeals for the District of Columbia Circuit was decided on January 21, 1974. No judgment has been entered. A timely petition for rehearing was denied on February 25, 1974. This petition for a writ of certiorari has been filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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## QUESTIONS PRESENTED

1. Whether the Natural Gas Act authorizes the Federal Power Commission to eliminate discrimination in the existing curtailment system based on long-standing contracts by nullifying the entire contractual curtailment system, instead of simply modifying it to the extent necessary to eliminate the alleged discrimination?

2. Whether the Natural Gas Act authorizes the Commission to deal with shortages in the supply of natural gas by establishing a curtailment plan that revises the existing contract-based curtailment system far beyond what is necessary to deal with the emergency?

3. Whether the Commission may replace the established contract-based curtailment system with a curtailment plan that disregards the existing character of service under the contractual system and that does not attempt to minimize the destruction of contractual rights and expectations?

4. Whether the National Environmental Policy Act requires the Commission to prepare an Environmental Impact Statement before establishing an interim curtailment plan?

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## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

National Environmental Policy Act, 42 U.S.C. § 4332(c). Natural Gas Act, §§ 5(a), 7(b), 16, 19(b); 15 U.S.C. §§ 717(d), 717(f), 717(o), 717(r).

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## STATEMENT OF THE CASE

On April 15, 1971, the Federal Power Commission issued Order No. 431, requiring all jurisdictional pipeline companies anticipating possible curtailment of deliveries of natural gas to file tariff sheets setting forth a curtailment plan. On July 6, 1971, El Paso Natural Gas Company responded and filed with the Commission proposed tariff

sheets that would reallocate its existing gas supplies and pipeline capacity and establish new priorities of service in the event that curtailment of deliveries becomes necessary. Under El Paso's proposed curtailment system, the reallocation and curtailment would result in major deviations from existing, long-standing contracts and would drastically alter El Paso's future delivery obligations. Hearings on the proposed tariff sheets were held intermittently from November, 1971, until May, 1972. This matter is still pending before the Commission.

On August 17, 1972, El Paso filed a motion requesting the Commission to issue an order prescribing interim emergency curtailment rules and regulations to govern the delivery of natural gas on its Southern Division System for the year November, 1972, to November, 1973. El Paso alleged that studies completed after the hearings on the proposed tariff sheets showed a need to begin the curtailment of natural gas deliveries to customers on its Southern Division System as early as the Fall of 1972. The Commission's staff had stated in its previously filed brief, however, that El Paso's proposed curtailment plan would in effect constitute a permanent alteration and abandonment of service in conflict with Section 7(b) of the Natural Gas Act. El Paso replied that if the Commission accepted the Staff position, any action by El Paso to implement a proposed curtailment plan could subject El Paso to statutory penalties and to civil damages for breach of contract.

On September 1, 1972, the Commission ordered the record in the original proceedings to be reopened and hearings to be held for the limited purpose of receiving

evidence on the need for an interim curtailment plan and what form a curtailment plan, if necessary, should take. Hearings were held from September 12 to September 25, 1972.

On October 31, 1972, the Commission issued Opinion No. 634, entitled "Opinion and Order Prescribing Interim Emergency Curtailment Plan." This Opinion declared that the existing curtailment system was discriminatory and violative of the Natural Gas Act. The Opinion then established an interim emergency curtailment plan for El Paso's Southern Division, setting up a completely new schedule of priorities for deliveries of natural gas in the event curtailment became necessary. On December 15, 1972, the Commission issued a clarifying order, Opinion No. 634-A.

The Commission established the following schedule of priorities, according to which deliveries in the subordinate categories must be curtailed completely before higher priorities are curtailed:

Priority 1. Residential, small commercial (less than 50 Mcf on a peak day) and residential needs associated with industrial requirements served directly or indirectly.

Priority 2. Large commercial requirements and industrial requirements for plant protection, feed-stock and process needs.

Priority 3. All industrial requirements not specified in Priorities 2, 4 and 5.

Priority 4. Industrial requirements for boiler fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where existing alternate fuel capacity is present.

Priority 5. Industrial requirements for large volume (in excess of 3,000 Mcf per day) boiler-fuel use where existing alternate fuel capability is present.

San Diego Gas & Electric Company, Pacific Gas and Electric Company, Southern California Gas Company, Southern California Edison Company, American Smelting and Refining Company, Compania Minera de Cananea, S.A. de C.V., Inspiration Consolidated Copper Company, Kennecott Copper Corporation, The City of Willcox, Arizona Electric Power Cooperative, and The Department of Water and Power of the City of Los Angeles appealed to the Court of Appeals for the District of Columbia Circuit. The appeals were consolidated.

The Court of Appeals affirmed the Commission's holding that the existing curtailment system was discriminatory. The court also held that the Natural Gas Act did authorize the Commission to abrogate totally the contract-based curtailment system and to prescribe in its place an interim emergency curtailment plan that establishes priorities for delivery of natural gas vastly different than the priorities established contractually by El Paso and its customers and approved for many years by the Commission.

The Court of Appeals declined to require the Commission to prepare an Environmental Impact Statement under the National Environmental Policy Act before preparing and implementing the interim curtailment plan. Other issues, mostly dealing with details of the curtailment plan itself, were remanded to the Commission for further proceedings. The Court of Appeals denied San Diego's petition for rehearing on February 24, 1974.

## REASONS FOR GRANTING THE WRIT

### 1. THE FEDERAL POWER COMMISSION HAS EXCEEDED ITS AUTHORITY UNDER THE NATURAL GAS ACT IN ESTABLISHING AN EMERGENCY CURTAILMENT PLAN THAT TOTALLY REVISES THE EXISTING CURTAILMENT SYSTEM BASED ON LONG-STANDING CONTRACTS.

This controversy presents questions about the scope of the authority of the Federal Power Commission to abrogate existing contractual arrangements in its efforts to eliminate discrimination in the established system of priorities for curtailing deliveries of natural gas during shortages. The Natural Gas Act unquestionably authorizes the Commission to prevent discrimination in the curtailment of deliveries of natural gas and to modify the existing contract-based curtailment system in order to prevent discrimination. In *F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), this Court upheld the Commission's authority to impose its own curtailment plans on deliveries of natural gas by jurisdictional gas pipelines; this Court also indicated that the Commission would have emergency authority to establish interim curtailment plans. *Id.* at n. 18. But the scope of its authority to displace the established contract-based curtailment system and abrogate existing contractual rights and expectations must nevertheless be limited. Congress has empowered the Commission to override the established curtailment system for specific purposes only, not for whatever reasons it wants. Likewise, the emergency authority of the Commission must not extend beyond what is necessary to deal with the emergency at hand.

Delineating the limits of the Commission's statutory authority to rearrange the established system of priorities

for natural gas has significance beyond the natural gas industry, however. In the foreseeable future federal agencies of all kinds will be called upon more and more to step in and regulate the distribution of natural resources in short supply. Difficult indeed is the task facing these agencies in allocating limited natural resources to users accustomed to unlimited supplies, in deciding whose needs get satisfied in what amounts and in what order. It is important, however, that all federal agencies, in carrying out their responsibilities to deal with actual or expected shortages, do not exceed the authority Congress has given them. For it is Congress, not the agencies themselves, that must decide the extent to which the exigencies of an emergency authorize interference in the established contractual arrangements.

In issuing its order for an interim emergency curtailment plan, the Commission found that the existing curtailment system discriminated against some residential and small volume commercial users east of California. Its concern was that in the event curtailment became necessary these "human needs" consumers would be curtailed before larger commercial and industrial users in California. The justification for imposing an interim emergency curtailment plan was that potential natural gas shortages in the near future might, under the existing curtailment system, leave these "human needs" consumers without natural gas at certain times. Yet the emergency curtailment plan does not confine itself to protecting these residential and small commercial users; it does not simply elevate these "human needs" users above all larger commercial and industrial users. Instead, the interim curtail-

ment plan attempts to reorder all priorities, including the priorities among the larger commercial and industrial users. In effect, the Commission's curtailment plan, intended to eliminate discrimination against residential and commercial customers east of California, upgrades and improves the quality and level of service to all east of California customers, especially the larger commercial and industrial customers to the detriment of all California customers.

A total revision of the established contract-based curtailment system is well beyond what was needed to prevent discrimination against just some of El Paso's customers. Furthermore, to set up an entirely new schedule of priorities for all customers solely to meet the limited emergency posed by the risk of curtailment to some "human needs" customers, seems to exceed greatly the emergency authority granted to the Commission by the Natural Gas Act and the *Louisiana Power & Light* case. It would seem that the Commission has implemented a matter of policy rather than dealt with an emergency.

The question of what limits there are on the authority of the Commission in dealing with emergency shortages in the supply of natural gas to disrupt existing contractual rights and expectations should not be left unresolved. It is submitted that the Commission's authority is limited to those actions necessary to correct such defects as discrimination in the established curtailment system and to prevent or alleviate the effects of an emergency.

2. **THE FEDERAL POWER COMMISSION AND THE COURT OF APPEALS HAVE FAILED TO RECOGNIZE THE DUTY OF THE COMMISSION TO PRESERVE ESTABLISHED CONTRACT RIGHTS AND EXPECTATIONS NOT IN CONFLICT WITH THE PUBLIC INTEREST.**

This case provides an opportunity to set standards to be used by the Federal Power Commission in regulating the curtailment of deliveries of natural gas during shortages. In *F.P.C. v. Louisiana Power & Light Co*, 406 U.S. 621 (1972), this Court affirmed the Commission's authority to abrogate established contract-based curtailment arrangements and substitute its own curtailment plans. This Court did not, however, indicate the extent of the Commission's authority to disregard the existing character of service in the natural gas industry, nor did it indicate the extent of the Commission's duty to preserve existing contractual rights and expectations. Since the Commission must still adopt a permanent curtailment plan for El Paso's Southern Division System, as well as other curtailment plans across the country, it is important that the Commission receive some guidance in formulating these curtailment plans as to its duty to take into account the existing character of service and to preserve existing contractual rights and expectations.

Nowhere in the Commission's opinions establishing the interim curtailment plan is there a mention or consideration of the duty to protect as much as possible rights and expectations founded upon long-standing and Commission-approved contracts. The Court of Appeals, while upholding the authority of the Commission to abrogate contract rights, does not impose any obligation on the Commission to minimize the destruction of contractual

hts. It is submitted that the Commission's authority to override existing contract-based curtailment systems carries with it the duty to protect and preserve private contract rights and expectations to the extent they are not in conflict with the public interest. Unless this Court imposes such a duty on the Commission, it is feared that the absence of an appropriate concern for this duty might indicate that future curtailment plans will be established in total disregard of the existing contracts and character of service under them.

In the natural gas industry in general, and in El Paso's Southern Division in particular, customers of the pipeline companies have traditionally contracted for and received a wide variety of service. Undoubtedly, these customers (and their customers) have planned their investments and fuel supply activities in reliance upon their contractual expectations. To protect past investments and facilitate future investments, the Commission should be allowed to disturb contractual interests only to the extent necessary to safeguard the health and safety of "human needs" customers on El Paso's system.

In its interim curtailment plan, the Commission set up an entirely new system of priorities, ignoring almost completely the existing order of priorities. But the public interest to be served was the prevention of discrimination against "human needs" customers. The Commission substantially revised the distribution of natural gas among the larger commercial and industrial customers and as a result substantially disrupted their contractual rights and expectations (and presumably their investment patterns). Yet the Commission apparently did not consider the

public interest in requiring wholesale revisions in the distribution of natural gas to large commercial and industrial users. Had the Commission recognized its duty to minimize the impact of governmentally-imposed curtailment plans on established *contractual arrangements*, the *major* reallocations of natural gas among large commercial and industrial users might not have been ordered.

This Court should stop the Commission's movement away from the inherent duty of the Commission to protect private contractual rights and expectations where not required to meet the particular public interest being prejudiced.

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### 3. THE FEDERAL POWER COMMISSION FAILED TO COMPLY WITH THE REQUIREMENTS OF THE NATIONAL ENVIRONMENTAL POLICY ACT.

It is the position of the Federal Power Commission that § 4332(c) of the National Environmental Policy Act does not require the preparation of an Environmental Impact Statement before establishing an interim plan to curtail deliveries of natural gas, even though the interim curtailment plan results in a substantial reduction in the quantity of natural gas delivered to certain areas and consequently a substantial increase in the amounts of higher polluting fuel oil burned in these areas. Two Courts of Appeal, including the District of Columbia Circuit in this case, excused the Commission from complying with NEPA in the preparation and implementation of its interim curtailment plans, even though it is not questioned that such activities are major Federal actions significantly affecting the environment. Exemption from NEPA has been granted on the

basis that compliance would unduly impede the Commission in dealing with the emergency presented by anticipated shortages in the supply of natural gas. Because of the critical importance of the objectives of NEPA, this Court should decide, it is submitted, whether an "emergency" exemption from NEPA is authorized or justified.

It should be pointed out that the interim curtailment plan for El Paso's Southern Division System went into effect on October 31, 1972, and has therefore been in operation for over one and one-half years. During this period, substantial quantities of natural gas have been redirected from California to east of California customers, necessitating the use of higher polluting fuels in California. This reallocation was, however, established without consideration of the environmental effects. Yet the Commission's action would seem to be precisely the kind of action that was meant by NEPA to be taken only after an evaluation and consideration of the environmental effects. The curtailment plan distributes supplies of natural gas, but it also distributes air pollution. In deciding whose supplies of natural gas should be curtailed, the Commission unavoidably decided whose air will be polluted. Certainly the allocation of identifiable amounts of air pollution is the kind of governmental action for which NEPA requires an assessment of the environmental effects.

The Fifth Circuit in *Atlanta Gas Light Co. v. Federal Power Commission*, 476 F.2d 142 (5th Cir. 1973), created an emergency exemption for the Commission in establishing an interim plan for curtailing deliveries of natural

gas. The Court thought that the Commission's duty to take effective interim curtailment action in the event of gas shortages excused it from the requirements of NEPA. The Court of Appeals in this case agreed and exempted the Commission's interim curtailment plan for El Paso's Southern Division System.

This Court should scrutinize carefully all claims for "emergency" exemption from the requirements of NEPA. As federal agencies are more and more forced to respond to shortages in natural resources, it can be expected that more and more claims for "emergency" exemptions from NEPA will be heard. The availability of emergency exemptions for dealing with shortages in natural gas supplies or other resources is a decision for Congress, not the federal agencies. Until Congress acts, this Court should assume the responsibility to supervise the granting of emergency exemptions and to prescribe the circumstances appropriate for emergency exemption and the length of time such exemptions should be available.

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## CONCLUSION

Emergency shortages in the supply of natural gas bring into sharp focus the conflict between two important public interests, between the need to prevent unjust, unreasonable, or unduly discriminatory treatment in the curtailment of deliveries of natural gas and the need to preserve the stability of the existing contract-based curtailment system. The Natural Gas Act affords a reasonable accommodation between these conflicting interests: it authorizes the Federal Power Commission to modify

existing contracts but only to the extent necessary to prevent unjust, unreasonable, or discriminatory treatment. In this case the Commission failed to recognize this limit on its legislative authority and as a result failed to recognize its duty to accommodate both public interests. In its efforts to prevent discrimination among "human needs" customers and deal with an emergency potentially affecting only some, the Commission unnecessarily disrupted the contractual arrangements among all customers and revised the entire system for everyone.

The prospect that the Commission must now and in the future impose or approve many curtailment plans emphasizes the importance of defining clearly the scope of the Commission's authority. This case provides an opportunity for this Court to review the Commission's curtailment power that was recognized but not defined in *Louisiana Power & Light.*

Respectfully submitted

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DONALD J. RICHARDSON, JR.,
DAVID R. PIGOTT,
CHICKERING & GREGORY,
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*San Diego Gas & Electric Company.*

May 24, 1974.

**(Appendices Follow)**

## Appendix I

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-2204

AMERICAN SMELTING AND REFINING COMPANY, COMPANIA MINERA DE CANANEA, S.A. DE C.V., INSPIRATION CONSOLIDATED COPPER COMPANY AND KENNECOTT COPPER CORPORATION, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

TUCSON GAS & ELECTRIC COMPANY
JOHNS-MANVILLE PRODUCTS CORP.
GENERAL MOTORS CORP.
SAN DIEGO GAS AND ELECTRIC CO.
EL PASO NATURAL GAS CO.
SOUTHERN UNION GAS CO.
SHELL OIL CO.
SOUTHWEST GAS CORPORATION
SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT
ARIZONA PUBLIC SERVICE CO., INTERVENORS

No. 73-1016

SAN DIEGO GAS AND ELECTRIC COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

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JOHNS-MANVILLE PRODUCTS CORP.
GENERAL MOTORS CORP.
TUCSON GAS AND ELECTRIC CO.
SHELL OIL COMPANY
SOUTHERN UNION GAS CO.
SOUTHWEST GAS CORP.
SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT
EL PASO NATURAL GAS COMPANY
ARIZONA PUBLIC SERVICE CO.
SOUTHERN CALIFORNIA EDISON CO.
PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
AMERICAN SMELTING AND REFINING CO., ET AL.,
INTERVENORS

No. 73-1040

PACIFIC GAS AND ELECTRIC COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

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GENERAL MOTORS CORPORATION
JOHNS-MANVILLE PRODUCTS CORP.
TUCSON GAS AND ELECTRIC CO.
SHELL OIL COMPANY
SOUTHERN UNION GAS CO.
SOUTHWEST GAS CORP.
SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT
EL PASO NATURAL GAS CO.
ARIZONA PUBLIC SERVICE CO.
SOUTHERN CALIFORNIA EDISON CO.
PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
SAN DIEGO GAS AND ELECTRIC CO.
AMERICAN SMELTING AND REFINING CO., ET AL.,
INTERVENORS

No. 73-1042

SOUTHERN CALIFORNIA GAS COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

---

GENERAL MOTORS CORPORATION
JOHNS-MANVILLE PRODUCTS CORP.
TUCSON GAS AND ELECTRIC CO.
SOUTHERN UNION GAS CO.
SOUTHWEST GAS CORP.
SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT
SHELL OIL CO.
EL PASO NATURAL GAS CO.
ARIZONA PUBLIC SERVICE.
SOUTHERN CALIFORNIA EDISON CO.
PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
SAN DIEGO GAS AND ELECTRIC CO.
AMERICAN SMELTING AND REFINING CO., ET AL
NEVADA INDUSTRIAL CUSTOMERS, INTERVENORS

No. 73-1050

SOUTHERN CALIFORNIA EDISON COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

---

TUCSON GAS AND ELECTRIC CO.
SHELL OIL CO.
JOHNS-MANVILLE PRODUCTS CORP.
GENERAL MOTORS CORP.
SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT
ARIZONA PUBLIC SERVICE CO.
EL PASO NATURAL GAS CO.
PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
SOUTHERN UNION GAS CO.
SAN DIEGO GAS AND ELECTRIC CO.
DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES
AMERICAN SMELTING AND REFINING CO., ET AL
SOUTHWEST GAS CORP., INTERVENORS

No. 73-1102

AMERICAN SMELTING AND REFINING COMPANY, COMPANIA MINERA DE CANANEA, S.A. DE C.V., INSPIRATION COSOLIDATED COPPER COMPANY AND KENNECOTT COPPER CORPORATION, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

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EL PASO NATURAL GAS CO.
PACIFIC GAS AND ELECTRIC CO.
SHELL OIL COMPANY
GENERAL MOTORS CORP.
JOHNS-MANVILLE PRODUCTS CORP.
SOUTHWEST GAS CORP.
SAN DIEGO GAS AND ELECTRIC CO.
SOUTHERN UNION GAS CO.

No. 73-1116

CITY OF WILLCOX AND ARIZONA ELECTRIC POWER COOPERATIVE, INC., PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

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AMERICAN SMELTING AND REFINING CO., ET AL
JOHNS-MANVILLE PRODUCTS CORP.
GENERAL MOTORS CORPORATION
EL PASO NATURAL GAS CO.
SAN DIEGO GAS AND ELECTRIC CO.
SOUTHERN UNION GAS CO., INTERVENORS

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No. 73-1148

SOUTHERN UNION GAS COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

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AMERICAN SMELTING AND REFINING CO., ET AL.
EL PASO NATURAL GAS CO.
TUCSON GAS AND ELECTRIC CO.
GENERAL MOTORS CORP.
JOHNS-MANVILLE PRODUCTS CORP.
SAN DIEGO GAS AND ELECTRIC CO.
SOUTHWEST GAS CORP.
PACIFIC GAS AND ELECTRIC CO., INTERVENORS

No. 73-1152

DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

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SHELL OIL COMPANY
EL PASO NATURAL GAS COMPANY
TUCSON GAS AND ELECTRIC COMPANY
SOUTHERN GAS CORPORATION
GENERAL MOTORS CORPORATION
JOHNS-MANVILLE PRODUCTS CORP.
AIR POLLUTION CONTROL DISTRICT OF THE COUNTY OF LOS ANGELES
AMERICAN SMELTING AND REFINING CO., ET AL
SOUTHERN UNION GAS CO.
SAN DIEGO GAS AND ELECTRIC CO., INTERVENORS

Petitions for Review of Orders of the Federal Power Commission

---

Decided January 21, 1974

*K. R. Edsall* for petitioner in No. 73-1042, also argued for petitioners in Nos. 73-1016, 73-1040, 73-1050 and 73-1152.

*Robert J. Haggerty* for petitioner in No. 73-1148 and intervenor Southern Union Gas Company.

*Arnold D. Berkeley*, with whom *George Spiegel* was on the brief for petitioner in No. 73-1116.

*George W. McHenry, Jr.*, Acting Solicitor, Federal Power Commission with whom *Leo E. Forquer*, General Counsel and *Platt W. Davis, III, Attorney*, Federal Power Commission were on the brief for respondent. *Gordon Gooch*, General Counsel at the time the record was filed also entered an appearance for respondent in No. 73-1116.

*Edward J. Grenier, Jr.*, with whom *Richard Noland* and *Richard J. Pierce, Jr.*, were on the brief for intervenors, General Motors Corporation and Johns-Manville Products Corporation.

*Jerome Ackerman* and *James R. McCotter* were on the brief for petitioners in Nos. 72-2204 and 73-1102 and intervenor, American Smelting and Refining Co. et al.

*Sherman Chickering, C. Hayden Ames* and *David R. Pigott* were on the brief for petitioner in No. 73-1016 and intervenor San Diego Gas and Electric Company. *Donald J. Richardson, Jr.*, also entered an appearance for intervenor San Diego Gas and Electric Company in Nos. 72-2204, 72-1040, 73-1042 and 73-1050.

*Rollin E. Woodbury, Alan M. Nedry, Edward C. Farrell* and *Arthur T. Devine* were on the brief for petitioner in No. 73-1050.

*Frederick Searls* entered an appearance for petitioner in No. 73-1040 and intervenor Pacific Gas and Electric Company in Nos. 73-1102 and 73-1148. *Daniel E. Gibson* also entered an appearance for intervenor Pacific Gas and Electric Company in No. 73-1102.

*John P. Mathis, J. Calvin Simpson* and *Lawrence Q. Garcia* were on the brief for intervenors, The People of the State of California and the Public Utilities Commission of the State of California in Nos. 73-1016, 73-1040, 73-1042 and 73-1050.

*Thomas F. Brosnan* and *Lawrence V. Robertson, Jr.*, were on the brief for intervenor Tucson Gas and Electric Company in Nos. 72-2204, 73-1016, 73-1040, 73-1042, 73-1050, 73-1148 and 73-1152.

*C. Frank Reifsnyder* was on the brief for intervenors, El Paso Natural Gas Company.

*John William Whitsett* and *Edward Farrell* were on the brief for intervenor Air Pollution Control District of the County of Los Angeles in No. 73-1152.

*Thomas G. Johnson* entered an appearance for intervenor, Shell Oil Company in Nos. 72-2204, 73-1016, 73-1040, 73-1042, 73-1050, 73-1102 and 73-1152. *Dan A. Bruce* also entered an appearance for intervenor Shell Oil Company in No. 73-1050.

*Charles H. McCrea* entered an appearance for intervenor Southwest Gas Corporation in Nos. 72-2204, 73-1016, 73-1040 and 73-1042. *Leonard L. Snaider* entered an ap-

pearance for intervenor Southwest Gas Corporation in Nos. 73-1050, 73-1102 and 73-1148 and intervenor Southern Gas Corporation in No. 73-1152.

*Richard H. Silverman* entered an appearance for intervenor Salt River Project Agricultural Improvement and Power District in Nos. 72-2204, 73-1016, 73-1040, 73-1042 and 73-1050.

*Richard M. Merriman* entered an appearance for intervenor Arizona Public Service Company in Nos. 72-2204, 73-1016, and 73-1040. *Peyton C. Bowman, III*, also entered an appearance for intervenor Arizona Public Service Company in Nos. 72-2204, 73-1016, 73-1040 and 73-1116.

*Henry F. Lippitt* entered an appearance for intervenor Nevada Industrial Customers in No. 73-1042.

Before: FAHY, *Senior Circuit Judge*, TAMM and MACKINNON, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* TAMM.

Concurring Opinion filed by *Senior Circuit Judge* FAHY at p. 49.

TAMM, *Circuit Judge:* We are called upon to review orders of the Federal Power Commission which establish a temporary curtailment plan for use on the Southern Division System of the El Paso Natural Gas Company. The temporary plan was approved on October 31, 1972 and will remain in effect until the Commission approves a permanent plan.[1] The purpose of a curtailment plan is to

[1]The interim plan was originally supposed to expire on October 31, 1973 unless a permanent plan was approved before then. On October 18, 1973, however, the Commission extended the operation of the interim plan pending further action on a permanent plan.

provide procedures for the allocation of gas among customers during periods of gas shortage. Much of the difficulty encountered in formulating such procedures for the El Paso system arises from the variety of customers it serves. The two California customers, Southern California Gas Company (SoCal) and Pacific Gas and Electric Company (PG&E) are partial requirements customers, i.e. El Paso is only one of the sources from which they obtain gas supplies. The customers situated in the southwestern states east of California, on the other hand, are full requirements customers. Many, if not all, of the service contracts between El Paso and its east-of-California (EOC) customers require El Paso to supply all gas requirements up to a stated daily maximum.[2] In the past, the EOC customers have borne the entire burden of service curtailments. Neither of the California customers had ever experienced any reduction of service from El Paso under former curtailment plans.[3] Not surprisingly, the alignment of the parties before us reflects this difference between the two categories of customers. The California customers object strongly to various aspects of the temporary plan. The EOC customers generally support the temporary plan although they, too, oppose certain features.

## I. Background

On April 15, 1971, the Commission issued Order No. 431, a statement of general policy. Citing recently ex-

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[2]J.A. at 735, 740, 746, 751, 757, 763, 769 and 776.

[3]J.A. at 343-44, 353 (Testimony of Mr. Travis Petty).

perienced natural gas shortages,[4] the order required jurisdictional pipeline companies to take all steps necessary for protection of reliable and adequate gas service.[5] Any pipeline which expected that curtailment of service might be necessary was ordered to file tariff sheets setting forth a curtailment plan. Several months after order 431 was issued, El Paso filed proposed tariff revisions which modified the provisions in El Paso's FPC Gas Tariff governing curtailments in El Paso's Southern Division System. This matter is still pending before the Commission and no final order has been issued.

During the proceedings on the proposed revisions, however, El Paso filed a motion requesting the Commission to prescribe interim emergency curtailment procedures to be followed until the issuance of its final order. Although hearings regarding the proposed permanent plan had already been completed, they were reconvened for the limited purpose of ascertaining the need of hearings, the tailment procedures. Following ten days of hearings, the matter was submitted directly to the Commission, bypassing intermediate decision by the Administrative Law Judge. On October 31, 1972, the Commission issued Opinion No. 634, which (i) declared that the curtailment provisions of El Paso's tariff then in force were discriminatory and violative of the Natural Gas Act and (ii) established a temporary curtailment plan to be followed in El

[4]Although the parties seem to agree that there is a serious shortage of natural gas, we make no assumption on this point. We pause, however, to note the following advertisement which appeared at page 23 of the Wall Street Journal on October 26, 1973: "Natural Gas—Long Term Supply Available—50 Billion Cubic Ft.—We can provide a 15 year supply at 10 million cubic ft. per day."

[5]The order is codified at 18 C.F.R. § 2.70 (1973).

Paso's Southern Division until October 31, 1973 or the issuance of a final order in the proceedings, whichever should occur earlier.[6] This order and a later clarifying order are the subject of the present petitions for review.

## II. The Commission's Action

In Opinion No. 634 the Commission found that, in the event of a gas shortage, El Paso's existing tariff provisions called for complete cut-off of all EOC customers, including residential and small commercial customers, before any service to California would be curtailed.[7] Thus, even industrial users in California would have priority over EOC residential users. After concluding that these provisions were discriminatory and violative of sections 4 and 5 of the Natural Gas Act, the Commission further found that an interim curtailment plan should be adopted based upon the following schedule of priorities:

Priority 1. Residential, small commercial (less than 50 Mcf on a peak day) and residential needs associated with industrial requirements served directly or indirectly.

Priority 2. Large commercial requirements and industrial requirements for plant protection, feed-stock and process needs.

Priority 3. All industrial requirements not specified in Priorities 2, 4 and 5.

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[6]The expiration date has been changed. See note 1, *supra*.

[7]According to the Commission's findings, the former tariff provisions required El Paso to curtail its customers in the following sequence (J.A. at 136):

(a) best efforts gas; (b) irrigation gas; (c) direct industrial gas; (d) industrial gas of distributors east of California (EOC); (e) commercial gas of distributors EOC; (f) residential gas for distributors EOC; (g) gas sales to California customers under Rate Schedule G.

Priority 4. Industrial requirements for boiler fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where existing alternate fuel capacity is present.

Priority 5. Industrial requirements for large volume (in excess of 3,000 Mcf per day) boiler-fuel use where existing alternate fuel capability is present.[8]

Under the interim plan, delivery reduction in each subordinate category must be complete before deliveries for higher priority requirements are curtailed. The stated purpose of the plan is twofold: "(1) to protect deliveries for residential and small volume commercial consumers who cannot be safely curtailed on a daily basis and (2) to require, as the initial level of curtailment, reduction in deliveries for large volume boiler fuel applications where alternate fuels are available."[9] Following the issuance of Opinion 634, a number of parties requested stays, clarification, modification and rehearing. On December 15, 1972, the Commission issued Opinion 634-A, denying the requests for stay, modification and rehearing and clarifying the earlier opinion on several points.

Various parties have challenged the authority of the Commission to prescribe the interim curtailment plan, the adequacy of the fact findings upon which the plan is based and the appropriateness of the remedy it has adopted. Although we conclude that the Commission has the authority to implement interim curtailment plans

[8]J.A. at 144.
[9]J.A. at 143-44.

pending final approval of permanent tariff provisions, we are compelled to remand this matter to the Commission because of certain defects in the orders now under review.

## III. The Commission's Authority

The authority of the Federal Power Commission to regulate service curtailments by natural gas pipelines has been sustained by the Supreme Court in *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972). The narrow question in that case was whether the FPC has jurisdiction to regulate curtailment of service to direct sales customers (as opposed to customers who purchase gas for resale.) In deciding this issue in favor of the Commission, the Court provided broad guidance as to the scope of the Commission's authority. The Court found that the Commission's power to regulate curtailments is derived from two provisions of the Natural Gas Act: section 1 (b), which makes the Act applicable to "the transportation of natural gas in interstate commerce," and section 16, which gives the Commission broad enforcement powers:

> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter.

*Id.* at 638, 642. The Court also pointed out that the substantive standard for regulation of service curtailments is found in section 4 (b) of the Act. *Id.* at 642. That section provides:

> No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the

> jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

The general authority of the Commission to regulate curtailment plans is not questioned by the petitioners and intervenors. It is argued, however, that the Commission has exceeded this authority in issuing Opinions 634 and 634-A. This contention is directed to substantive features of the opinions as well as the procedure whereby they were issued.

A. *Interim Orders*

As explained above, the orders under review are interim orders. An interim order is one entered during the course of proceedings which resolves some of the issues while leaving others to be determined at a later time. The use of interim orders is a well established practice in rate proceedings. *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 583-85 (1942); *FPC v. Tennessee Gas Co.* 371 U.S. 145, 154 (1962). Although we are not aware of any case testing the use of this device in a curtailment proceeding, Supreme Court dicta indicates that it is perfectly proper. In *Louisiana Power & Light Co., supra,* the Court discussed the alternative Commission procedures available for regulation of curtailment plans. Noting the delay inherent in the section 5 procedure, the Court observed:

> Of course, even when conducting a § 5 hearing, the Commission would have emergency authority to issue interim orders effecting a curtailment plan.

406 U.S. at 644 n.18 (citation omitted). While this footnote mentions only the use of interim orders in section 5 proceedings, the technique has also been approved in proceedings under section 4, *FPC* v. *Tennessee Gas Co.*, 371 U.S. 145, 154 (1962). The fact that the instant proceedings were originally initiated under section 4 has no bearing on the Commission's authority to promulgate the interim orders.

The briefs reveal some confusion as to the precise basis and extent of the Commission's authority to issue interim orders. It is suggested by some parties that the Commission was exercising "emergency authority"[10] and that the interim orders were only justified to the extent necessary to meet anticipated human needs shortages.[11] We think it is important, at the outset, to correct this misunderstanding of the Commission's authority.

The Commission's power to promulgate an interim curtailment plan is not born of emergency. Rather, it is based upon the statutory authorization to perform "any and all acts" necessary or appropriate for the implementation of the Natural Gas Act. As we have stated before, of course, section 16 does not itself grant independent powers but merely provides for implementation of the core sections of the Natural Gas Act. *Texaco, Inc.* v. *FPC*, 474 F.2d 416, 420 (D.C. Cir. 1972), *cert. granted,*

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[10]San Diego Br. at 22; FPC Br. at 33.

[11]Edison Br. at 18; San Diego Br. at 20-23; SoCal Br. at 9; Willcox Br. at 44.

42 U.S.L.W. 3194 (U.S. Oct. 9, 1973) The "core section" underlying the orders now before us is section 5(a) which empowers the Commission, on its own motion, after hearing, to correct discriminatory practices by natural gas companies. Like any order issued pursuant to section 5 (a), an interim order can only issue after full hearing and must include a statement of reasons based upon findings of fact which are supported by substantial evidence in the record. No emergency can excuse these procedural requirements.

This is not to say that the exigencies of a gas supply shortage are completely irrelevant. The threat of a heating-season shortage such as that discussed in the briefs would be relevant to at least two determinations which the Commission must make: (1) whether an interim curtailment order is necessary and (2) whether a particular interim plan is just and reasonable. If, for example, there were no expectation that gas shortages would occur before a permanent plan could be formulated, then an interim order might be unnecessary, even though the existing curtailment regulations may be clearly discriminatory. Similarly, once it becomes necessary to adopt interim curtailment procedures, a plan which might not meet the "just and reasonable" standard if profferred as a final order might be acceptable as a temporary measure in light of the emergency. In short, the existence of an emergency is a factor to be considered by the Commission and by this court upon judicial review. It does not create special powers in the Commission, however, nor does it abrogate the usual procedural requirements for valid administrative action.

B. *Abrogation Of Contract Rights*

One of the most persistent objections to the Commission's curtailment plan is that it disrupts the contractual relations of the parties. The California customers point out that they have negotiated for and received firm commitments from El Paso, whereas the service to EOC customers is, by the terms of their contracts, subject to curtailment.[12] The new curtailment plan, however, requires all of El Paso's customers to share ratably the burden of any future gas shortage. According to the California customers, this deprives them of the protection from service interruptions for which they have contracted and provides a windfall to less diligent customers east of California. The short answer to this argument is that the Commission is not bound by agreements among parties subject to its jurisdiction. Section 5(a) of the Act gives the Commissioner authority to override discriminatory contractual arrangements:

> (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract

[12]This interpretation of the El Paso service contracts is not undisputed. *See* Brief of Intervenors American Smelting and Refining Co. *et al.* at 2-9.

> to be thereafter observed and in force, and shall fix the same by order . . . .

In issuing Opinions 634 and 634-A, the Commission was clearly acting within this provision.[13] Having found that then existing curtailment procedures for El Paso's Southern Division were discriminatory, the Commission was authorized to promulgate substitute procedures. To the extent that the illegal curtailment plan was reflected in customer service contracts, such contracts were also superseded by the Commission's orders.

Several of the parties concede the Commission's authority to override contractual arrangements, but argue that the opinions now under review lack certain threshhold findings which, they say, are a condition precedent to the exercise of that authority. These parties rely chiefly upon the following passage from *International Paper Co.* v. *FPC*, 476 F.2d 121, 128 (5th Cir. 1973):

> It must be recognized that there are two quite difficult determinations that the FPC must take before it can abrogate terms in private contracts even accepting the most favorable reading that the claimed power can be given. First, we feel it is incumbent on the agency to give clear reasons why it has determined that these substitute fuel clauses are indeed "undue preferences" within the meaning of that term in the Natural Gas Act.
>
> . . . .
>
> Secondly, we feel that the FPC must make findings and set forth its reasons for holding that abrogation of these clauses is "in the public interest." The FPC

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[13]Opinion No. 634, ¶ 4, J.A. at 135.

> must show that the recognized public interests in freedom to contract and contract stability are outweighed by the public interest it seeks to assert under the Natural Gas Act.

Taken out of context, this language appears pertinent. A full reading of the *International Paper* case discloses, however, that the issue in that case was quite different from that presented here. The question decided in *International Paper* was whether the Commission's adoption of a curtailment plan would *ipso facto* immunize the pipe line from liability for breach of service contracts. In other words, would a pipe line be liable to its customers for non-delivery if acting in compliance with a valid Commission order which contains no express findings regarding contractual liability. The court concluded that such an order would not be an absolute defense absent express findings with respect to contractual liability. 476 F.2d at 125. Hence, the twin findings mentioned in the *International Paper* opinion are only required for the purpose of exonerating a pipe line from liability for breaches of contract which may result from compliance with Commission orders.[14] The petitions now before us do not concern the remedial rights of the pipe line and its customers *inter sese*, but the authority of the Commission to override a contractually arranged curtailment plan. On the latter question, that statute leaves no doubt. The only preliminary finding required by the statute is

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[14] We express no opinion as to the correctness of the *International Paper* decision, which suggests that a pipeline whose own shortsightedness or overreaching necessitates a curtailment plan should not be immune from contractual liability. 476 F.2d at 126 n.5.

that the former plan was discriminatory, a finding clearly expressed in Opinion 634.[15]

C. *The End Use Method*

As explained above, the plan adopted in Opinion 634 establishes a schedule of priorities to be followed in allocating gas service curtailments. The differentiating factor among these priorities is "end use." Thus, the Commission has determined that certain uses of gas (e.g. use by residential and small commercial customers) should have a higher priority than others (e.g. use as boiler fuel). In the event of a shortage, customers purchasing gas for inferior uses will be completely cut off before any service to higher-priority customers is curtailed. Several parties take issue with the Commission's treatment of boiler fuel uses in this scheme. Their objections are discussed below at part V, C. For the moment we wish to take up the contention of petitioner City of Willcox that the Commission "exceeded its statutory powers by prescribing service priorities based upon the nature of end use by ultimate consumers."[16] Unlike those who merely object to the Commission's treatment of boiler fuel uses, Willcox asserts that the entire scheme of end use priorities is illegal. We disagree.

Willcox' attack on the Commission's authority is twofold. Its first contention is that end use is an improper criterion. The authorities relied upon by Willcox are inapposite, however. In *Fuels Research Council, Inc.* v. *FPC*, 374 F.2d 842 (7th Cir. 1967), the court approved

[15]J.A. at 136-37.

[16]Br. at 48 *et seq.*

a two-part rate structure which allocated costs among peak season customers and off-peak customers. A dissatisfied customer complained that the rate structure in question would encourage "inferior" uses of natural gas. The court replied that the Commission "is not authorized to consider the end use of natural gas in a *rate proceeding* [citation omitted] as distinguished from a certificate proceeding under section 7 of the Act." *Id.* at 854 (emphasis added). The decision does not prohibit consideration of end use in a curtailment proceeding.

*Public Service Commission of the State of New York* v. *FPC*, 463 F.2d 824 (D.C. Cir. 1972), also cited by Willcox, involved the Commission's certification of a proposed sale of natural gas for use in an oil refinery. The New York Public Service Commission sought review, arguing that the contemplated use was inferior to use by interstate residential and commercial customers. We remanded the case to the Commission for consideration of that objection.[17] The Commission sustained itself and the New York Commission again sought review. We affirmed the Commission, concluding: " . . . it cannot be said that 'a balance of *all* the circumstances' weighs against granting the certificate here." *Id.* at 829-30. It is important to note, however, that we did not disapprove consideration of end use in certification proceedings:

> In different certificate applications the factor of end use will have varying importance. In the case at bar the end use factor is not, by itself, of decisive importance. While it may be true that as to the particular natural gas involved, it would be desirable

[17] Public Service Commission of the State of New York v. FPC, 436 F.2d 904 (D.C. Cir. 1970).

> to have this gas go into the hands of residential rather than industrial users, there is no assurance that this would happen if the certificate were not granted.

*Id.* at 826.

Willcox' second objection to the end use method is that the plan effects a "reallocation" of gas supplies in violation of section 7(a). Willcox relies upon *FPC v. Transcontinental Gas Corp.*, 365 U.S. 1 (1961). In that case the Supreme Court was called upon to review the Commission's refusal to approve a contract for the sale of natural gas to be used as boiler fuel. The Commission denied certification on grounds, *inter alia*, that the proposed use of the gas was inferior to residential needs. The Court *approved* the Commission's action, stating that end use was a proper consideration in disapproving the contemplated sale. 365 U.S. at 22. Although this holding endorses the Commission's consideration of end use, the Willcox brief directs our attention to the following admonition of the Court:

> [I]t must be realized that the Commission's powers under § 7, are, by definition, limited. [Citation omitted.] The Commission cannot order a natural gas company to sell gas to users that it favors; it can only exercise a veto power over proposed transportation and it can only do this when a balance of *all* the circumstances weighs against certification.

*Id.* at 17. We reiterated that admonition in *Granite City Steel Co. v. FPC*, 320 F.2d 711 (D.C. Cir. 1963), also cited in the Willcox brief, when we disapproved the Commission's wholesale reallocation of pipe line capacity from industrial users to public utility customers. Neither that

ruling nor the dictum of the Supreme Court quoted above is in point, however. Both opinions were concerned with section 7(a) which prohibits the Commission from compelling a natural gas company to sell natural gas when to do so would impair service to existing customers. As we stated in *Granite City:*

> The theory and purpose of the statutory restriction appear to be that persons desiring gas *for the first time,* or desiring *more* gas, should not get it by taking it away from existing lawful customers.

320 F.2d at 713 (emphasis added). Quite clearly, this statutory restriction is not infringed by a curtailment plan based on end use. The curtailment plan does not order the sale of additional gas to one customer to the detriment of another. Rather, it prescribes a formula for allocating insufficient supplies among existing customers. We are not unmindful of Willcox' argument that *the effect* of the interim plan under review is the same as an order reallocating gas supplies from one customer to another, since the former curtailment plan would have protected the California customers from service curtailments. Even if this is true, however, we do not think the statutory prohibition applies to curtailment plans. Section 7(a) is plainly intended to regulate *expansions* of service. The prohibitory proviso we have been discussing must be read in that context. If this clause is construed to forbid approval of any curtailment plan which effects a shifting of the burden of future gas shortages, then the Commission would be powerless to regulate curtailments. Such a result would obviously be at odds with the Supreme Court's holding in *Louisiana Power & Light, supra.*

We conclude, therefore, that the curtailment plan now under review does not violate the section 7(a) prohibition against reallocation of gas service and is not inconsistent with previous decisions regarding the propriety of end use criteria in the regulation of the natural gas industry. Indeed, we think end use is a most appropriate consideration for purposes of a curtailment plan.

## IV. The Commission's Findings of Fact

Several of the parties maintain that certain of the Commission's fact findings are not adequately supported by the evidence. The standard of our review in such matters is defined by the Natural Gas Act, section 19(b):

> The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.

### A. *Findings Regarding The Former Plan*

In Opinion No. 634 the Commission found that, under tariff provisions then in effect, El Paso's California customers would be protected from service curtailments until all service to EOC customers had been completely cut off. As a result, the Commission found, human needs customers (residential and small commercial customers) in one part of the El Paso system would be subordinate to industrial customers in another part in the event of a severe gas shortage. That the Commission's concern was more than merely theoretical is apparent from the following statement:

> The supply evidence introduced by El Paso at the reopened proceeding clearly indicated that there was a real probability that curtailments under its presently effective tariff would result in cutting off not

> only commercial customers east of California but residential customers also, while California would *propably be curtailed not at all.*

J.A. at 137. Based upon these findings, the Commission concluded that the curtailment provisions of El Paso's tariff were discriminatory under sections 4 and 5 of the Natural Gas Act.

We think the Commission's findings as to the effect of El Paso's former curtailment plan are, for the most part, sustained by substantial evidence in the record. Exhibit 237[18] before the Commission indicates that, under the former plan, EOC customers would have borne the entire burden of estimated curtailments for the twelve-month period commencing on November 1, 1972, while service to California remained undisturbed. On a peak day, deliveries to EOC distributors for resale to residential and commercial customers would have been curtailed by about 25%, according to the estimate, and EOC direct industrial customers would have been completely shut off.[19] In addition, there would have been some amount of EOC curtailment on virtually every other day of the year.[20] This evidence was summarized by one of El Paso's witnesses at the hearings:

> Q. And what conclusion do you draw from, or would you have us draw from, the showings made in [Exhibit 237, Schedule 1]?

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[18] "Summary of Estimated Monthly Mainline Requirements, Curtailment and Sales for the Period November 1, 1972 through October 31, 1973 Based on El Paso's Currently Effective Tariff," Prepared by El Paso Natural Gas Co., J.A. at 651 *et seq.*

[19] J.A. at 477 (Testimony of M. K. O'Toole of El Paso Natural Gas Co.).

[20] Exhibit 237, Schedule 1, pp. 14-17, J.A. at 665-68; J.A. at 477 (Testimony of M. K. O'Toole of El Paso Natural Gas Co.).

> A. I can tell you what conclusions I draw from the information shown there, and that is significant curtailment *of the customers east of California, of the* commercial and residential component of the requirements on a peak day, and full service to California, and significant industrial and irrigation curtailments to the east of California customers on the average days throughout the year, while full service is being rendered to the California customers by El Paso.

J.A. at 542. Several petitioners challenge these estimates, stating that supplies have been underestimated and peak day demands exaggerated. The maximum demand estimate is, in fact, based upon a hypothetical coincidence of peak demand days throughout the El Paso system.[21] Such an eventuality is so improbable, it is argued, that there is no substantial evidence to support the Commission's forecast of commercial and residential curtailments east of California. We think that the evidence supports the Commission. There was credible testimony that the weather conditions required for a systemwide coincidence of peak demand had in fact occurred in the past and were likely to occur again.[22] Moreover, the forecasting of demand for natural gas is a matter within the peculiar expertise of the Commission and cannot lightly be upset by a reviewing court.

The estimated supply figures presented by El Paso are questioned because they fail to include two sources of gas. The first of these is withdrawal of gas from certain wells in excess of amounts allowed by various state

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[21] J.A. at 475.

[22] J.A. at 477, 540-41, 546, 554 (Testimony of M. K. O'Toole of El Paso Natural Gas Co.).

regulatory authorities. There was reliable testimony, however, to the effect that "exceeding allowables" is a short-term emergency measure involving potential adverse effects upon supplies in the future.[23] The Commission was not required to insist that this resource be exhausted before it could conclude that EOC commercial and residential customers were in danger of curtailment. The second source of gas not included in the supply estimate is gas which would be made available through curtailment of "field sales." Even taking into account curtailments of field sales, however, it is clear that severe curtailment of EOC customers would have persisted. The proposed curtailment of field sales could only provide an additional 69,000 Mcf of gas to offset peak day curtailments of EOC residential-commercial service which were expected to reach 226,000 Mcf.[24]

In short, we think the Commission's prediction of severe EOC curtailments under the former plan is supported by substantial evidence. We note, however, that the testimony does not distinguish between commercial and residential service for purposes of estimating peak day demands. Exhibit 237 merely contains figures representing aggregate peak day curtailments of both commercial and residential EOC customers which could have been anticipated under the former plan.[25] There is no indication that residential customers would actually have been cur-

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[23]J.A. at 568-69, 572 (Testimony of A. M. Derrick of El Paso Natural Gas Co.).

[24]Exhibit 237, Schedule 1, pp. 1-14, 18, J.A. 651-65, 669.

[25]Testimony indicates that separate estimates of residential and commercial needs on a peak day were not available to El Paso. J.A. at 545 (Testimony of M. K. O'Toole of El Paso Natural Gas Co.).

tailed at all.[26] It is possible that the estimated 25% cutback of residential-commercial service would have been completely absorbed by the commercial sector. Consequently, there is no substantial evidence to sustain the finding that EOC residents would "probably" or "undoubtedly" have been curtailed under the old plan. On the other hand, the evidence does sustain the conclusion that peak day curtailment would, at minimum, cause the complete shut-down of EOC direct industrials and substantial reduction of service to EOC commercial customers while California service remained undisturbed. We think the latter findings form a sufficient basis for the Commission's actions to the extent we affirm them in this opinion. We recognize, of course, that the Commission might have followed a different course of action had it not incorrectly concluded that EOC residential customers would "undoubtedly" be curtailed under El Paso's previous tariff provisions. Upon remand, the Commission is free to modify its orders accordingly, subject to further review by this court.

B. *Findings Regarding "Grouping"*

"Grouping", or "conjunctive billing" as it is sometimes called,[27] is a practice whereby a customer having more than one delivery point on a pipeline is permitted to take delivery of its gas entitlements at whichever delivery

[26]El Paso's witness conceded that he could not predict residential curtailment on an *average* day, as opposed to a peak day, J.A. at 545.

[27]We note that these terms are not necessarily synonymous. *See* Decision of Administrative Law Judge on Grouping of Delivery Points, p. 1 (September 19, 1973). (This decision approves grouping for purposes of the permanent plan.)

points and in whatever proportions it chooses. Because this practice was not mentioned in Opinion 634, El Paso requested clarification of the Commission's position with respect to grouping. The Commission responded in Opinion 634-A as follows:

> [W]e find that the imposition of conjunctive billing as proposed by El Paso is not justified at this time, and could well result in increased industrial gas usage by those customers having a number of delivery points. Certainly it could result in discrimination against those customers, including California, who have only one delivery point.

J.A. 241. Southern Union Gas Co. ("Union") objects to this prohibition against grouping. Union is a gas distribution company with many relatively small distribution systems scattered along El Paso's Southern Division System. Each of Union's systems connects with the El Paso line but they are not otherwise interconnected. Prior to the Commission's prohibition against grouping, service curtailments to Union were computed on a systemwide basis. Thus, if a 30% curtailment of priority 5 gas were in effect on a given day, Union would be curtailed by a volume equal to 30% of the total of its priority 5 entitlements. The effect of Opinion 634-A is that curtailments to Union must now be computed separately for each delivery point. Mathematically, the result would appear to be the same, but as the testimony of Union's Vice-President points out, there is a significant difference:

> A. The best way to explain it probably would be to take the case of a delivery point from El Paso to Southern Union through which only one industrial customer is served. We have, in fact, several such

situations. Let's assume this is a Priority 4 customer with a daily requirement of 1,000 Mcf, and that during a particular 10-day period El Paso is curtailing its Priority 4 deliveries an average of 30 percent each day. In that situation, as El Paso is interpreting Opinion No. 634-A, Southern Union cannot receive for redelivery to this customer more than 700 Mcf on any one day. And right there is where we run into trouble, because many of our industrial customers cannot, as a practical matter, continue operating their facilities if their gas supply is subject to any significant curtailment. So far as gas usage is concerned, they are either completely on or completely off.

J.A. 582-83 (Testimony of Oran L. Haseltine). The grouping method would permit Union to deliver gas to its on-or-off customers in such a way that none would be curtailed more than necessary and systemwide curtailment of Union would be on a level equal with other El Paso customers. Thus, if a 30% curtailment of priority 4 customers were in effect for a ten-day period:

> [W]e could provide the customer with his full requirements on seven days and cut him off completely for three. This, over the full 10-day period, would give him merely the same 7,000 Mcf in the aggregate which we have assumed to be his entitlement. Instead of effectively shutting him down for the entire 10 day period simply because he cannot operate on only 700 Mcf per day, we would have enabled him to continue operating 70 percent of the time.
>
> . . . .
>
> By staggering the days of cut-off among them, we obviously should be able to put all of them on the same sort of three-days-off, seven-days-on schedule

> I've been talking about, and still overall not be delivering more gas to them on any day than the aggregate of its individual allotments of gas for that purpose; none of El Paso's other customers would suffer any resultant decrease in service.

*Id.* at 586-87. We are not called upon here to judge the merits of the grouping technique. The testimony set out above is cited only for the purpose of explanation. The question before us now is whether the Commission acted arbitrarily in prohibiting this practice. Union argues that there is no evidence of record to support the Commission's finding that grouping of delivery points "could result in discrimination against those customers, including California, who have only one delivery point." The Commission's brief fails to point out any such evidence and, at oral argument, counsel conceded that there was none:

> QUESTION: Well, couldn't we find that there was no substantial evidence supporting the grouping decision and just excise that out of the order?
>
> MR. McHENRY: Your Honor, there is no substantial evidence supporting the position taken by Southern Union on this record that it should necessarily have grouping. This was just—
>
> QUESTION: Is there any evidence to the contrary?
>
> MR. McHENRY: I don't believe there is evidence to the contrary, either way or the other, on this record, your Honor.

Tr. at 44. The Commission suggests that its action was justified because Union failed to raise the issue at hearings

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[28] J.A. at 550 (Testimony of M. K. O'Toole of El Paso Natural Gas Co.), 576 (Testimony of James M. Kiely, Jr. of the FPC staff).

on the interim plan. It is clear, however, that the burden is upon the Commission to show that substantial evidence sustains its finding that grouping of delivery points would be discriminatory. There is no indication that the question was ever considered until El Paso requested clarification of the Commissioner's original order, Opinion No. 634. Indeed, testimony before the Commission strongly suggests that it was understood by all parties that grouping would be permitted. We conclude, therefore, that the Commission's findings with respect to grouping are not supported by substantial evidence. The Commission's Opinion No. 634-A must be reversed to the extent that it prohibits grouping of delivery points by El Paso's customers, and remanded for further fact findings.

## V. The Commission's Conclusions of Law

At this point it may be helpful, for purposes of our analysis, to restate the source of the Commission's authority to prescribe an interim curtailment plan:

> Whenever the Commission . . . shall find that any rate, charge or classification . . . or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order . . . .

Natural Gas Act, section 5(a). The Commission's exercise of its authority under this statute is a two-step adjudicatory process: first, the Commission must find that an existing condition is unjust or discriminatory; second,

the Commission must prescribe the remedy for that condition. Each step requires the Commission to draw a legal conclusion, *viz:* the illegality of an existing condition and the justness and reasonableness of the remedy. In the present case, the Commission has found that El Paso's former curtailment procedures are "discriminatory under sections 4 and 5 of the Natural Gas Act" and that the temporary curtailment plan promulgated in Opinion 634 is "reasonable, necessary, appropriate and in the public interest." Our reviewing function with respect to such conclusions of law is somewhat different from that applied to the Commission's findings of fact. This difference was pointed out in the concurring opinion of Chief Judge Stephens in *Capital Transit Co. v. Public Utilities Commission,* 213 F.2d 176, 187 (D.C. Cir.), *cert. denied,* 348 U.S. 816 (1954):

> The decisions require a commission in a quasi-judicial proceeding to make basic findings supported by evidence and ultimate findings which flow rationally from the basic findings—this in order that the commission shall itself perform the initial function of evaluating the evidence and deciding the issues of fact, and in order that the courts, as reviewing tribunals, can decide whether or not the ultimate decision reached by the commission follows as a matter of law from the facts found as its basis, and also whether or not the facts found have substantial support in the evidence.

*See also Saginaw Broadcasting Co. v. FCC,* 96 F.2d 554, 559 (D.C. Cir.), *cert. denied,* 305 U.S. 613 (1938); *In re United Corp.,* 249 F.2d 168, 179-80 (3rd Cir. 1957); *Greater Boston Television Corp. v. FCC,* 444 F.2d 841, 850 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971). The Commis-

sion's action must be sustained if it is reasonable in light of the basic fact-findings and the record evidence. In the matter now before us, a number of the parties challenge the reasonableness of the Commission's action. This part of the opinion will consider those objections.

A. *"Pre-existing Curtailment"*

Petitioners Southern California Edison Co. and the Department of Water and Power of the City of Los Angeles (hereafter referred to collectively as "Edison") argue that the Commission's action is unreasonable in light of the gas supply shortages being experienced in the California market.[29] The Southern California Gas Company (SoCal) and the San Diego Gas and Electric Company (San Diego) also complains that the Commission has ignored the shortages in California. The position of SoCal and San Diego is that the Commission should have taken the alleged California shortages into account in formulating the interim plan. Edison, on the other hand, argues that, had the Commission considered these shortages, the former plan would not have been found to be discriminatory.

Edison's argument must fail. The Commission properly found, based upon substantial record evidence, that the former curtailment plan would have required complete cutoff of EOC customers prior to any curtailment by El Paso of its service to California customers.[30] Based upon

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[29]For purposes of clarity, we do not follow Edison's practice of referring to these shortages as "pre-existing curtailment." In fact, there had never been any curtailment of El Paso's service to its California customers prior to adoption of the interim plan. J.A. at 340, 344, 353 (Testimony of Mr. Travis Petty of El Paso Natural Gas Co.).

[30]See the discussion at part IV A, *supra*.

this finding it was reasonable for the Commission to conclude that the former tariff provisions governing curtailment were discriminatory, regardless of the shortages which plague California.

SoCal and San Diego raise a more difficult question, namely: was it reasonable for the Commission to issue an interim curtailment plan which fails to take into account pre-existing gas shortages in California? In our opinion the answer is yes. Admittedly, the Commission's opinions are devoid of any mention of recent supply shortages in California, although the record contains testimony on the matter.[31] The opinions call for ratable curtailment of all customers without any adjustments which might lighten the burden of curtailment for customers already experiencing shortages. These facts strongly suggest that the Commission ignored the California supply problem when it formulated the interim plan. If the Commission had promulgated a *permanent* curtailment plan under these circumstances, failure to consider the pre-existing shortages in California and to enunicate findings with respect to that situation would almost certainly have been fatal. The orders under review are *interim* orders, however. On review, the court must take into account the temporary nature of the Commission's action as well as the exigencies which prompted the Commission to grant interim relief. An interim order is not arbitrary simply because it fails to resolve all issues raised in the proceeding.

In the present case, we think the Commission's action was reasonable. Once having determined that the existing

[31] J.A. at 529-31 (Testimony of John C. Abram of Southern California Gas Co.).

curtailment procedures were discriminatory, the Commission was faced with the choice of allowing them to remain in effect pending issuance of a permanent order, or instituting a temporary plan which would cure at least the more severe defects of the illegal plan. The main purpose of the interim plan was to avert the danger that EOC residential users might be curtailed during the winter of 1972-73. The pre-existing shortages in California add complex problems, the resolution of which the Commission properly deferred until the issuance of a final order.

Our approval of the Commission's action is obviously based upon the assumption that it has merely deferred consideration of California market conditions and that this factor will be taken into account in the formulation of the permanent plan. Ideally, such an intention should be expressed in the agency's interim order, so that the reviewing court is not left to guess at its reasoning. Upon remand, therefore, we invite the Commission to incorporate into its interim order a full statement of its reasons for postponing the resolution of issues arising from the California gas shortage.

B. *Withdrawals From Storage*

In computing the curtailment to be apportioned to each of its customers on a particular day, El Paso is required to use a formula set forth in section 11.3(b)(i) of its revised tariff, which we paraphrase as follows:

$$\frac{\text{Customer's Needs}}{\text{Systemwide Needs}} = \frac{\text{Customer's Share}}{\text{Available Supply}}$$

J.A. at 347 (Testimony of M.A. Erlich). Because California customers rely on El Paso for only part of their gas

supply, only part of their needs are counted for purposes of this formula. The proper proportion is determined by the ratio of scheduled deliveries from El Paso to total scheduled deliveries from all sources. If, for example, only one-half of the California customer's supply for the day is scheduled to be provided by El Paso, then only one-half that customer's requirements are counted for purposes of computing its share of the shortened El Paso supply. The basic formula set out above quickly discloses the effect of such a reduction of the "needs" figure: it reduces the customer's share of the El Paso supply.

The California customers do not challenge the basic fairness of this scheme, but they strongly object to the treatment of stored gas as an independent source of supply, because at least some of the gas withdrawn from storage on a particular day will be traceable to previous purchases from El Paso. Treating this gas as an independent supply, it is argued, results in an underestimation of El Paso's share of the total California market. This in turn causes excessive curtailment of California customers by El Paso. Apparently recognizing this problem, the Commission staff recommended an adjustment to the curtailment formula.[32] The Commission declined to include the adjustment in the interim plan, however, stating that it would add an "additional complication."[33] We do not think this brief and conclusory statement is sufficient to sustain the Commission's rejection of the staff proposal. As we stated in our discussion of "pre-existing curtailment," *supra*, problems which greatly complicate the Com-

[32] J.A. at 483 (Testimony of James M. Kiely, Jr. of the FPC staff).

[33] Opinion 634, ¶ 12, J.A. at 141.

mission's work may properly be deferred if prompt interim action is necessary. In this instance, however, the staff had apparently been able to devise a solution for use under the interim plan. There is no suggestion that the proposed storage adjustment formula would impede implementation of the interim plan. The mere fact that the solution is complicated cannot justify the Commission in refusing to provide just and reasonable interim curtailment procedures. We therefore remand this matter to the Commission for further consideration of the proposed storage adjustment formula.

One further question was raised in the briefs concerning the Commission's treatment of withdrawals from storage. SoCal takes the position that no part of such withdrawals should be counted as a source of supply for purposes of curtailment. To do otherwise, it is argued, will discourage the development of gas storage facilities. This prediction is convincingly disputed by testimony in the record.[34] Even if SoCal is correct, however, an otherwise just and reasonable determination of the storage issue is not invalid merely because it might be a disincentive to the storage of gas. The development of storage facilities is an ancillary policy consideration committed to the discretion of the Commission. The failure of a particular proposal to conform in all respects to established policies of natural gas regulation does not necessarily preclude Commission approval of the proposal.[35]

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[34]J.A. at 346-49 (Testimony of M. A. Erlich of El Paso Natural Gas Co.).

[35]For similar reasons, we do not think arguments addressed to the economic impact of the interim plan (SoCal Br. at 20; PG&E Br. at 17; San Diego Br. at 31), its effect on the development of alternate fuel facilities (PG&E Br. at 21) and the availability of

C. *Shift of Industrial Gas*

Perhaps the most strenuous objections of the California customers to the temporary plan are directed toward its effect on the allocation of gas for industrial uses. As explained above, the old curtailment plan placed every EOC customer in a priority subordinate to all California customers. In the event of a gas shortage, the California customers would have been the last to suffer any curtailment. Since the temporary plan is based upon categories of end use, however, the California customers must now share ratably any curtailment which becomes necessary. As a result, EOC industrial users will suffer less immediate curtailment than under the old plan and the California industrial users will suffer more. This effect is referred to by the California customers as a "shift" of industrial gas from California to EOC users. They complain that this measure is not warranted by the "emergency" and not necessary for the protection of EOC human needs customers.[36] This contention plainly misapprehends the basis and scope of the Commission's action.

In Opinion 634 the Commission clearly found that the former curtailment plan was discriminatory *in toto,* not just in its effect upon EOC human needs customers:

> Under [the former] tariff provision no curtailment would take place to California customers until all EOC service had been curtailed. This means that both residential and commercial customers east of

"less disruptive" plans (SoCal Br. at 24) require reversal of the Commission's interim order. Of course any of these factors may take on greater significance for purposes of a permanent curtailment plan.

[36]Tr. at 24; SoCal Br. at 13; PG&E Br. at 13 *et seq.*; Edison Br. at 20-22; San Diego Br. at 7-8, 20-23.

> California would be cut off before any service to California was cut off. Almost all of the parties concede that under the present circumstances this would patently discriminate against the EOC customers. The supply evidence introduced by El Paso at the reopened proceeding clearly indicated that there was a real probability that curtailments under its presently effective tariff would result in cutting off not only commercial customers east of California but residential customers also, while California probably would be curtailed not at all. It is obvious that we would be negligent in our duties if we allowed human needs customers on any portion of the system to be cut off while industrial customers were still receiving gas on another portion of the system. We find that the currently effective plan of El Paso, is discriminatory and violative of Section 4(b) of the Natural Gas Act.

J.A. at 136-137. Concededly, the Commission placed great emphasis upon the most egregious faults of the former plan, i.e. its effect upon EOC residential and small commercial customers. But the key findings of the Commission refer to EOC customers generally: the former curtailment plan "would patently discriminate against the EOC customers" because ". . . no curtailment would take place to California customers until all EOC service had been curtailed." Since we have already concluded that these findings are sustained by substantial evidence (part IV A), the only remaining question is whether the temporary plan is arbitrary in its treatment of industrial users in California. We think not. The ratable curtailment of industrial users in order to protect supplies to Priority 1 and Priority 2 customers is a reasonable interim course

of action in light of the Commission's findings. Although it might not be the sole solution or the best solution, it is certainly within the range of conclusions which might be reached by reasoned decision making. A separate question arises regarding the Commission's disparate treatment of boiler fuel users as opposed to other industrial customers. This is treated in the following section.

D. *Boiler Fuel Uses*

Under the Commission's interim curtailment plan, the lowest two priorities (Priority 4 and Priority 5) are assigned to customers who use natural gas as boiler fuel when alternate fuel facilities are present. (The only difference between Priority 4 and Priority 5 is the daily volume involved.) Such customers will be the first to experience curtailment in the event of a gas shortage and service to them will be completely terminated before any curtailment of service to higher priority customers, including industrial customers applying gas to uses other than as fuel for boilers. Several of the parties argue that this treatment of boiler fuel uses is unreasonable[37] and not supported by substantial evidence.[38] It is also contended that the Commission failed to articulate its reasons for assigning the lowest priority to boiler fuel uses.[39] We think the last contention is dispositive.

A search of the two opinions under review reveals no specific findings or reasoning in support of the Commission's decision to assign boiler fuel uses of gas to the low-

[37]PG&E Br. at 20-22; Brief of Intervenor State of California at 7-8.

[38]Edison Br. at 33-35; Willcox Br. at 5-6.

[39]PG&E Reply Brief at 10; Willcox Br. at 55.

est priority. As we have stated many times in the past, the failure of an administrative agency to articulate the reasons for a particular decision makes meaningful review of that decision impossible. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). Upon remand of this proceeding, the Commission is directed to make findings concerning the curtailment priority appropriate for boiler uses and to state the reasons for its determination.

The Government suggests that it was not necessary for the Commission to state its reasoning in this matter because the determination is supported by established Commission policy and precedent. We requested supplemental briefing on this point by our Order of October 31, 1973, which posed the following question:

> Is there established Commission policy and precedent which will sustain the Commission's further finding (2) of Opinion No. 634 subordinating certain boiler fuel uses to all other uses?

We conclude that this question must be answered in the negative.

While it is true that the Commission has for a long time considered the use of natural gas as boiler fuel to be "inferior" to other uses,[40] it is clear from the decisions of the Commission that this policy has never been conclusive. Rather it is but one factor to be considered in making a regulatory decision affecting boiler fuel use. The Commission itself recently recited a litany of cases in which the use of natural gas as boiler fuel had been approved:

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[40] *See, e.g.*, Federal Power Commission Annual Report (1940) at p. 79.

> Commission policy in the past has not been to deny boiler fuel sales, but to authorize them where they served some public advantage. *Texas Gas Transmission Corp.*, 12 FPC 658 (1953); *Transcontinental Gas Pipe Line Corp.*, 11 FPC 615 (1952); *Northern Natural Gas Company* (Black Dog), 29 FPC 1025 (1963); *Michigan Wisconsin Pipe Line Company*, 32 FPC 737 (1964). In the *Transcontinental* case the Commission authorized the sale of interruptible gas to Duke Power Company for boiler fuel where it was shown that Transco would obtain additional revenues without substantial operating cost. In the *Northern Natural* case the Commission approved a sale of natural gas for resale for boiler fuel where the sale was contemplated in a settlement of Northern's rates and was therefore beneficial to Northern's customers. In the *Michigan Wisconsin* case the Commission authorized the direct sale of gas to a power company for boiler fuel use where there would be a fuel saving to the power company and a resulting rate reduction by Michigan Wisconsin.
>
> . . . .
>
> In our opinion, while we have termed boiler fuel use inferior in the past, at present it cannot necessarily be so termed because of the air pollution problem. In *Transcontinental Gas Pipe Line Corp.*, 38 FPC 906 (1967), the Commission approved delivery of additional firm gas to Con Ed for boiler fuel use noting amoung other things that is [*sic*] would be an affirmative step in dealing with the air pollution problem.

*Chandeleur Pipe Line Co.*, 44 FPC 1747, 1756 (1970). A subsequent opinion in the same case stated that "there is no superior or inferior use of natural gas *per se;* it depends upon the circumstances." *Chandeleur Pipe Line Co.*,

45 FPC 370, 371 (1971). Thus, the Commission's policy disfavoring the use of natural gas as boiler fuel can be outweighed by other considerations arising in a particular case. Our duty in this case is not to weigh the anti-boiler fuel policy against other factors, but to point out that such a balancing process must take place. The Commission's own recent statement of policy regarding curtailment priorities acknowledges as much:

> When applied in specific cases, opportunity will be afforded interested parties to challenge or support this policy through factual or legal presentation as may be appropriate in the circumstances presented.

FPC Order No. 467 at 1 (January 8, 1973).[41] The opinions now under review give no indication whether such an opportunity was provided or such a weighing of interests was conducted. In asking us to sustain its decision, the Commission is really asking us to hold that boiler fuel uses of natural gas are *per se* inferior to all other uses, for purposes of curtailment, regardless of the particular circumstances. As we said in *Public Service Commission of the State of New York v. FPC*, 463 F.2d 824, 826 (D.C. Cir. 1972), we are not prepared to so hold, and will not do so in the absence of a proper and definitive determination by the Commission that such is the case.

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[41]This order was modified by orders 467-A (January 15, 1973) and 467-B (March 2, 1973). The latter order contains the following statement: ". . . Order No. 467 is a policy statement and is not intended to initiate a proceeding or to provide a binding rule without further proceedings directed towards curtailment problems of specific pipelines."

E. *Volumetric Limits*

Following the issuance of Opinion 634, El Paso filed tariff revisions intended to implement the Commission's order. Section 11(j) of the revised tariff, which was approved by Opinion 634-A, establishes limits upon the amounts of gas El Paso's customers will be entitled to purchase while the interim order is in effect. There is both a daily limitation and a periodic limitation, i.e., a limit on the total amount of gas which may be purchased while the interim plan is in effect. For convenience, we shall refer to this latter limit as the annual limit. The daily limit is set at the maximum daily delivery obligation of El Paso under its contract with each customer. The annual limit is computed in either of two ways: (1) the limit for a customer who purchases his entire gas supply from El Paso (a "full requirements" customer) is the quantity actually received by that customer between July 1, 1971 and June 30, 1972 (plus any curtailment experienced during that period); (2) the limit for a customer who purchases only part of his gas supply from El Paso (a "partial requirements" customer) is a quantity equal to his maximum daily contract entitlement multiplied by the number of days in the year. Since the EOC customers are full requirements customers, the annual limit on their gas entitlements is measured under the first rule. The maximum annual entitlements of the two California customers (PG&E and SoCal) are measured under the second rule, however, because they are partial requirements customers.

Petitioner American Smelting and Refining Co. (Asarco) contends that the effect of this dual standard is that the

California customers will be permitted to purchase volumes of gas in excess of the amounts delivered to them in the past whereas Asarco and other EOC customers are limited to their historic takes.[42] In Asarco's view, such divergent treatment of these two classes of customers is discriminatory. The Commission, which devotes only a single footnote in its brief to the question, states simply that "[t]his treatment was reasonable and certainly within the Commission's discretion."[43]

We are unable to decide whether the Commission's action was reasonable or discriminatory because the Commission has not stated its reasons for adopting this dual annual limitation formula. The Commission's original order (Opinion 634) did not discuss or prescribe annual limitations. Opinion 634-A, which approved the El Paso tariff revision incorporating the formula, does no more than state that the annual limitations are consistent with those proposed by the Commission staff at the hearing.[44] In a subsequent order clarifying Opinion 634-A, the Commission shed little additional light upon the reason for its decision:

> East of California (EOC) customers are limited to annual takes during the twelve-month period ending June 30, 1972. This was provided for inasmuch as the existing contracts for EOC customers do not provide for annual limitations.

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[42]Although this result is not readily apparent, recent modifications of SoCal's contract with El Paso together with past transfers of gas between PG&E and SoCal make it possible. Asarco Br. at 41-43. The Commission apparently admits this in its brief at 52 n.54.

[43]*Id.*

[44]J.A. at 242.

Order of February 7, 1973, J.A. at 334. While this does explain the need for a tariff provision restricting annual consumption by EOC customers, it does not explain why these customers should be restricted on a different basis than the California customers. We must therefore remand this matter in order to provide the Commission with an opportunity to make further findings and to state the reasons for its decision or any modification of that decision which may appear to be necessary.

F. *Penalties*

Asarco also objects to the Commission's deletion of overrun penalties from the revised tariff filed by El Paso in response to Opinion 634.[45] These penalties are apparently intended to discourage El Paso's customers from taking amounts of gas in excess of their maximum daily allotment under the interim plan. In Opinion 634-A, the Commission removed the penalty provisions, stating:

> With regard to penalties for unauthorized overruns, we note that El Paso has never had them in its tariff and we do not consider it appropriate to institute them in an interim proceeding. As we also noted above, a number of customers have not recently revised their contracts and have been making substantial overruns for the use of human needs customers. While some provisions for preventing unauthorized overruns may well be necessary in a permanent curtailment plan, we do not believe we should prescribe one at this time.

J.A. at 242. The Commission's concern for human needs customers is clearly unnecessary. The stricken penalty

[45] *See* § 20 of the Revised Tariff, J.A. at 233-34.

provision carefully defined the term "unauthorized overruns" to exclude overruns taken for the purpose of fulfilling residential and small commercial requirements.[46] Consequently, the Commission's action cannot be sustained upon the stated reasoning.

We note that the passage quoted above makes vague reference to El Paso's past practices regarding penalties and to the "inappropriateness" of instituting such penalties in an interim plan. It is possible that these references were intended to state additional reasons for rejection of the penalty provisions. If so, we are of the opinion that such grounds are not sufficiently articulated so as to permit meaningful review here. This matter is remanded to the Commission, therefore, for further clarification of its reasons for deleting the penalty provisions of the El Paso tariff.

## VI. Environmental Impact

The National Environmental Policy Act (NEPA) requires that, "to the fullest extent possible," each federal agency shall issue a statement detailing the environmental impact of any major action significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C) (1970). Several parties in the present case take the position that the establishment of an interim curtailment plan is a major federal action requiring such an environmental impact statement. They charge that the Commission's failure to issue such a statement violates the statute. The Commission does not deny that Opinions 634 and 634-A constitute major federal actions, but contends that

[46] *Id.* § 20.2.

compliance with the Act was not "possible" within the meaning of the statutory phrase "to the fullest extent possible." The Commission acknowledges its duty to give a full accounting of the environmental impact upon issuance of its final permanent order. Its only contention here is that the same exigencies which prompted the issuance of an interim emergency curtailment plan prohibited full exploration of environmental problems prior to implementation of that plan.

This very question has been raised and decided in a similar case in the Fifth Circuit. In *Atlanta Gas Light Co. v. FPC*, 476 F.2d 142, 150 (5th Cir. 1973), the duties of the Commission under the Natural Gas Act were held to supercede the procedural dictates of NEPA:

> The mandate of the NEPA on federal agencies is that they comply with the procedural duties imposed by the Act to the fullest extent possible. See Calvert Cliff's Coord. Com. v. United States Atomic Energy Com'n D.C. Cir. 1971, 146 U.S.App.D.C. 33, 449 F.2d 1109, 1114-1115. As there noted, the legislative history of the NEPA interprets "to the fullest extent possible" to mean compliance unless compliance would give rise to a violation of statutory obligations. As *Louisiana Power & Light Co.*, supra, makes clear, the Federal Power Commission has a statutory duty to the public under the Natural Gas Act to take effective interim curtailment action in the exigencies presented by gas shortages. We cannot say that the NEPA suspends this duty of the Commission.

We think this reasoning is correct and dispositive. In the present case, the Commission's duty under the Natural Gas Act to prevent discriminatory practices in times of

gas shortage called for prompt action. This created the type of "statutory conflict" which alone can excuse compliance with section 4332(2) (c). *Calvert Cliffs' Coordinating Committee v. A.E.C.*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

Edison and SoCal attempt to distinguish *Atlanta Gas* on the ground that the time constraints at work in that case are absent here. Both parties note that in *Atlanta Gas* a revised tariff was filed in November 1971 indicating that immediate curtailment was required for the 1971-72 winter heating season. By contrast, El Paso's initial filing preceded issuance of the interim plan by some sixteen months, ample time for preparation of an environmental impact statement. This distinction is misleading. El Paso's original filing (July 6, 1971), which is still pending before the Commission, did not request interim action by the Commission. Rather, it contemplated the approval of a final permanent curtailment plan after full hearings. It was not until August of 1972 that El Paso requested an interim order regulating curtailments for the 1972-73 heating season, by then only a few months away.

Our discussion of this issue would not be complete without the following caveat. A federal agency which seeks to excuse itself from its duties under section 4332 (2) (C) cannot do so by simply ignoring that statute. Rather, it must make express findings which demonstrate the "statutory conflict" which prohibits compliance. *Cf. Calvert Cliffs' Coordinating Committee v. AEC, supra*, 449 F.2d at 1115; *Scientists' Institute for Public Information, Inc. v. AEC*, 481 F.2d 1079, 1094 (D.C. Cir. 1973). Opinion 634, standing alone, does not meet this

requirement. We think this defect is cured, however, by paragraph 10 of the clarifying opinion, No. 634-A.[47]

## VII. Summary

We hold that the Commission has authority under section 5(a) of the Natural Gas Act to establish, by interim order, a temporary curtailment plan based upon end use. This authority is not restricted by contractual arrangements among pipeline companies and their customers. The Commission's finding that the former curtailment plan was discriminatory and its determination to postpone consideration of preexisting gas shortages in the California market and to subordinate industrial uses of gas to residential and commercial uses are affirmed. Its determinations with regard to grouping, storage withdrawals, boiler fuel uses, annual volumetric limits and penalties for overruns are reversed for the reasons stated in this opinion. We further hold that the Commission's failure to issue an environmental impact statement at the time the interim plan was established did not violate NEPA 42 U.S.C. §4332(2)(c). This matter is remanded to the Commission for further proceedings consistent with this opinion. In order to insure orderly administration of gas curtailments, the Commission may continue the interim order in effect for a reasonable period of time pending its

[47] We note that over a year has passed since the implementation of the interim plan and that the plan has been extended indefinitely by the Commission's order of October 18, 1973. To the best of our knowledge, no environmental impact statement has yet been filed. It should be understood, however, that our ruling today is not a license for permanent or prolonged evasion of responsibilities under NEPA. If it becomes clear that the Commission's non-compliance is attributable to motives other than statutory impossibility, interested parties will not be barred by this opinion from seeking appropriate relief.

decision regarding the matters remanded for further consideration.

*So ordered.*

FAHY, *Senior Circuit Judge:* I concur except with respect to the scope of the remand. Upon my study of the record I conclude that the court should not disturb the Commission's interim plan regarding those parts thereof designated as follows in the court's opinion: (B) Withdrawals from Storage, (E) Volumetric Limits, and (F) Penalties. I would not require further consideration of these three subjects. In all other respects I concur in Judge Tamm's opinion for the court.

## Appendix 2

United States Court of Appeals
for the District of Columbia Circuit

September Term, 1973

No. 73-1016

San Diego Gas and Electric Company,
Petitioner

v.

Federal Power Commission,
Respondent

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Johns-Manville Products Corp.
General Motors Corp.
Tucson Gas & Electric Co.
Shell Oil Co.
Southern Union Gas Co.
Southwest Gas Corp.
Salt River Project Agricultural
Improvement and Power District
El Paso Natural Gas Co.
Arizona Public Service Co.
Southern California Edison Co.
People of the State of California
and the Public Utilities Commission
of the State of California
Intervenors

No. 73-1040

Pacific Gas and Electric Company,
*Petitioner*

v.

Federal Power Commission,
Respondent

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General Motors Corp.
Johns-Manville Products Corp.
Tucson Gas & Electric Co.
Shell Oil Co.
Southern Union Gas Co.
Southwest Gas Corp.
Salt River Project Agricultural
Improvement and Power District
El Paso Natural Gas Co.
Arizona Public Service Co.
Southern California Edison Co.
People of the State of California and
the Public Utilities Commission of the
State of California
San Diego Gas & Electric Co.
Intervenors

No. 73-1042

Southern California Gas Company,
Petitioner

v.

Federal Power Commission,
Respondent

---

General Motors Corp.
Johns-Manville Products Corp.
Tucson Gas & Electric Co.
Southern Union Gas Co.
Southwest Gas Corp.
Salt River Project Agricultural
Improvement and Power District
Shell Oil Co.
El Paso Natural Gas Co.
Arizona Public Service Co.
Southern California Edison Co.
People of the State of California
and the Public Utilities Commission
and the State of California
San Diego Gas & Electric Co.
American Smelting & Refining Co., et al.
Intervenor

No. 73-1116

City of Willcox and Arizona
Electric Power Cooperative, Inc.,
Petitioners

v.

Federal Power Commission,
Respondent

---

American Smelting & Refining Co., et al.,
Johns-Manville Corp.
General Motors Corp.
El Paso Natural Gas Co.
San Diego Gas & Electric Co.
Southern Union Gas Co.
Intervenors

[Filed Feb. 25, 1974]

Before: Fahy, Senior Circuit Judge; and Tamm and MacKinnon, Circuit Judges

ORDER

On consideration of: the petition for rehearing filed by San Diego Gas and Electric Company for rehearing; the petition for rehearing filed by Pacific Gas and Electric Company; the petition for rehearing filed by Southern California Gas Company; and the petition of City of Willcox and Arizona Electric Power Cooperative, Inc., for rehearing, it is

ORDERED by the Court that each of the aforesaid petitions is denied.

Per Curiam

For the Court:

/s/ Hugh E. Kline

Hugh E. Kline

Clerk

## Appendix 3

# FEDERAL POWER COMMISSION

# OPINION No. 634

# EL PASO NATURAL GAS COMPANY,

# DOCKET NO. RP72-6

OPINION AND ORDER PRESCRIBING INTERIM EMERGENCY CURTAILMENT PLAN

(Issued October 31, 1972)*

*Syllabus*

1. Commission authority to effectuate curtailment plans of interstate pipelines for deliveries to direct customers as well as sales for resale has been judicially affirmed. P. 933.

2. Interim curtailment rule for pipeline promulgated here, pending final adjudication after hearing, fulfills purposes for which Natural Gas Act was established. P. 934.

3. Adoption of interim plan here, while based upon duly certified record, is more in the form of an interim emergency rule; however, it will have the same legal force and effect as an approved curtailment plan under Order No. 431. P. 934.

4. Curtailment tariff which would allow human needs customers on any portion of pipeline's system to be cut off while industrial customers were still receiving

*Clarified, etc. by Opinion No. 634–A and order issued December 15, 1972, 48 FPC ___. Stay denied by order issued February 7, 1973; see also order on protests, etc., issued February 7, 1973, 49 FPC ___, ___.

gas on another portion af the system is found discriminatory and violative of Section 4(b) of the Gas Act. P. 935.

5. Commission *prescribes* interim curtailment priority categories for El Paso's Southern Division with basic objectives to: (1) protect deliveries for residential and small volume commercial consumers who cannot be safely curtailed on a daily basis; and (2) require, as initial curtailment level, reduction in deliveries for large volume boiler fuel usage. PP. 937, 938.

6. Curtailment tariff prescribed here will be in effect until October 31, 1973, or until a permanent plan is finally approved; should curtailment become necessary prior to the filing of interim tariff provisions, El Paso should curtail all industrials ratably. P.937.

7. Commission *denies* motion of Municipality and Coop for extraordinary relief from any curtailment plan during coming winter based on asserted inability to obtain sufficient fuel oil to satisfy projected electric generating requirements. P. 938.

8. Commission *prescribes* interim emergency curtailment plan for El Paso's Southern Division System under Sections 5 and 16 of the Natural Gas Act.

*C. Frank Reifsnyder, G. Scott Cuming, Walter G. Henderson* and *Donald Snow* for El Paso Natural Gas Company

*William R. Duff* and *Henry E. Brown* for El Paso Electric Company; Magma Copper Company; Phelps Dodge Corporation; Salt River Project Agricultural Improvement and Power District

*William J. Derrick* for El Paso Electric Company

*John F. Mills* for Magma Copper Company

*Leroy Michael, Jr.*, and *Richard H. Silverman* for Salt River Project

*Earl H. Carroll* for Phelps Dodge Corporation

*John T. Ketcham, Charles E. McGee* and *Robert G. Haggerty* for Southern Union Gas Company and Pioneer Natural Gas Company

*James R. Wetherbee* and *A. S. Grenier* for Southern Union Gas Company

*Jerry Hopson* for Pioneer Natural Gas Company

*Israel Butler, Thomas D. Clarke, K. R. Edsall* and *Norman J. Provost* for Southern California Gas Company

*Robert W. Tollen, Sherman Chickering, C. Hayden Ames* and *Donald J. Richardson* for San Diego Gas and Electric Company

*David D. Mix, John D. Maharg* and *John W. Whitsett* for Air Pollution Control District of the County of Los Angeles, California

*Walter F. Wolf, Jr.* for The Navajo Tribal Utility Authority

*Rufus G. Thayer, Jr., Lawrence O. Garcia* and *Mary Moran Pajlich* for The People of the State of California and The Public Utilities Commission of the State of California

*Mrs. Lilyan Goode Sibert* and *Renn C. Fowler* for General Services Administration

*Frederick G. Von Huben* for Community Public Service Company

*William S. Martin, Jr.* for The City of Lordsburg, New Mexico

*Henry F. Lippitt, II* for The Nevada Industrial Customers

*Reuben Goldberg* and *Leo J. Steffan, Jr.* for Nevada Power Company

*Darrell Clark, Charles H. McCrea* and *Lawrence V. Robertson, Jr.* for Southwest Gas Corporation

*H. Robert Barnes, R. E. Woodbury, Robert J. Cahall, William E. Marx* and *Alan Nedry* for Southern California Edison Company

*John H. Engel* for The Citizens Utilities Company

*Arthur T. Devine, Roger Arnebergh* and *Edward C. Farrell* for Department of Water & Power, City of Los Angeles, California

*Richard M. Merriman, Peyton G. Bowman, III* and *Brian J. McManus* for City of Mesa, Arizona and Arizona Public Service Company

*Robert T. Hall* and *N. H. Powell* for Arizona Public Service Company

*J. LaMar Shelley* for the City of Mesa, Arizona

*Thomas F. Brosnan* and *A. Y. Holeapple* for Tucson Gas and Electric Company

*Jerome Ackerman* and *James R. McCotter* for American Smelting and Refining Company, Compania Minera de Cananea, S.A., Inspiration Consolidated Copper Company and Kennecott Copper Corporation

*Timothy M. Kelleher, Daniel E. Gibson, Frederick T. Searls* and *Malcolm H. Furbush* for Pacific Gas and Electric Company

*William G. Riddoch, Thomas G. Johnson* and *Dan A. Bruce* for Shell Oil Company

*Heber P. Hardy* for Public Service Commission of Nevada

*George Mabry* for Johns-Manville Corporation and seven Nevada Industrial Customers of Southwest Gas Corporation

*Douglas W. Fraser* for New Mexico Public Service Commission

*Edward J. Grenier, Jr.* and *Richard C. Noland for* Johns-Manville Products Corporation

*Kermitt L. Waters* for the City of Las Vegas, Nevada

*Platt Davis* and *Jane Nix* for the Staff of the Federal Power Commission

Before Commissioners: John N. Nassikas, Chairman: Albert B. Brooke, Jr., Pinkney Walker and Rush Moody, Jr.

WALKER, *Commissioner:*

This proceeding arises from a filing on July 6, 1971, by El Paso Natural Gas Company (El Paso) wherein El Paso proposed revised tariff sheets that would allocate its firm reliable main line capacity of its Southern Division System and provide new priorities of service to be used in the event that a gas supply shortage required curtailment of deliveries below that capacity. We suspended this filing for the full five month period and set the case

for hearing. Hearings on the merits of this proposed permanent curtailment program have been held and that phase of this case is now pending before Presiding Administrative Law Judge Fribourg for his initial decision.

On August 17, 1972, El Paso filed a motion for the issuance of a Commission order prescribing interim emergency service rules and regulations to cover the curtailment of deliveries of natural gas on its Southern Division System for a period from November 1, 1972, until a final order is issued on its permanent curtailment plan. On August 24, 1972, Salt River Project Agricultural Improvement and Power District (Salt River) filed a motion to reopen the proceeding in this docket for the purpose of allowing evidence concerning El Paso's gas supply. By order of September 1, 1972, 48 FPC 428, we ordered that the record should be reopened for the limited purpose of taking evidence on the need for interim curtailment provisions and on the form such provisions should take. Hearings were held on these issues between September 12, 1972, and September 25, 1972. By our order of September 7, 1972, we also ordered that consideration be given to the claim of the City of Wilcox, Arizona (Wilcox) and Arizona Electric Power Cooperative (AEPCO) for extraordinary interim relief from the operation of any curtailment plan put into effect by El Paso. Because of the urgent nature of this proceeding on October 2, 1972, we granted a motion by El Paso for an order directing the Presiding Administrative Law Judge to certify the record on the interim curtailment procedures directly to the Commission for our decision. Briefs and reply briefs were filed on October 3, 1972, and October 10, 1972,

respectively and the entire record and the briefs are now before us for decision.

Essentially the main issues now before us are whether we have authority to issue an interim emergency service rule, whether the facts indicate that such an emergency rule is necessary and if so which of the several plans proposed is most appropriate for the interim period.

Our authority to effectuate curtailment plans of interstate pipelines for deliveries to direct customers as well as sales for resale has been affirmed. *F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972). As noted by the Supreme Court, the Commission has emergency authority to issue interim orders effecting a curtailment plan. *F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. at 644, note 18. While that affirmance was based primarily upon a tariff filing under Section 4 of the Natural Gas Act, we are also operating pursuant to Sections 5 and 16 of the Act in this case. As found below, without an interim curtailment plan the interests of El Paso's customers would be adversely affected. The exigencies of the situation, *i.e.* gas shortage and equities of El Paso's customers in this proceeding require prompt Commission action and a refusal to act would result in "gaps for private interests to subvert the public welfare." *F.P.C. v. Louisiana Power & Light Co., supra; F.P.C. v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 19-20, 28 (1961). We are also exercising the flexibility of authority delegated to us pursuant to Section 16 of the Act. *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968); *Mobil Oil Corp. v. F.P.C.*, 469 F.2d 130 (CADC-1972). *Cf. F.C.C. v. Schreiber*, 381 U.S. 279, 288-91 (1965); *Mesa Petroleum Co. v. F.P.C.*, 441

F.2d 182, 187 (CA5-1971). Thus, the purposes for which the Natural Gas Act was established, *e.g.*, to provide adequate service to consumers at the lowest reasonable rate, Sections 5 and 16 of that Act and applicable judicial interpretations are th bases upon which we are acting to promulgate an interim curtailment rule for El Paso, pending adjudication of a final plan in the hearing below. Our adoption of the interim plan, while based upon the record certified to us, is more in the form of an interim emergency "rule"; but this rule will have the same legal effect and force as an approved curtailment plan under Order No. 431, 45 FPC 570. See Opinion No. 606, 46 FPC 786, October 5, 1971, appeal docketed *sub nom. Mobil Gas Service Corp., et al. v. F.P.C.*, No. 71-1607, 5th Cir.

As interpreted by El Paso, its existing and currently effective tariff provision customers would be curtailed in time of shortage in the following order, (a) best efforts gas; (b) irrigation gas; (c) direct industrial gas; (d) industrial gas of distributors east of California (EOC); (e) commercial gas of distributors EOC; (f) residential gas for distributors EOC; (g) gas sales to California customers under Rate Schedule G. Under this tariff provision no curtailment would take place to California customers until all EOC service had been curtailed. This means that both residential and commercial customers east of California would be cut off before any service to California was cut off. Almost all of the parties concede that under the present circumstances this would patently discriminate against the EOC customers. The supply evidence introduced by El Paso at the reopened proceeding clearly indicated that there was a real probability that

curtailments under its presently effective tariff would result in cutting off not only commercial customers east of California but residential customers also, while California probably would be curtailed not at all. It is obvious that we would be negligent in our duties if we allowed human needs customers on any portion of the system to be cut off while industrial customers were still receiving gas on another portion of the system. We find that the currently effective plan of El Paso is discriminatory and violative of Section 4(b) of the Natural Gas Act.

At the reopened proceedings, El Paso witnesses showed that the original supply estimates presented in the main proceeding had not taken into account a reduction in casinghead gas volumes available to El Paso and also a decline in allowables, the watering out of wells, and difficulties with line pressures. The evidence clearly showed that on a peak day El Paso would undoubtedly have to curtail EOC customers to the point where residential service would be affected. In view of this, almost all of the parties to the proceeding agreed that some interim emergency plan should be put into effect and we certainly agree and so find.

At the hearing essentially four different interim curtailment plans were proposed by the various parties. These were proposed by El Paso, the Commission Staff, Johns Manville Products Corporation (JM), and by Southern California Gas Company (SoCal) with the concurrence of the Pacific Gas and Electric Company (PG&E). Various other parties to the hearings suggested variations of one or the other of the above plans or certain adjustments to the existing tariff which they felt

would suit the situation. However, the above four are the only complete plans presented which we consider to be ready for implementation at this time. A brief description of each plan follows.

Under El Paso's proposed interim plan, which apparently is similar to its proposed long range plan, there are essentially two main steps. First El Paso would allocate its existing reliable main line capacity among each of its customers. The second step involves establishing a system of priorities in the event that El Paso is unable to deliver volumes equal to its reliable main line capacity. The priority step of El Paso's plan would involve the establishment of four priorities as follows, (1) domestic and residential consumers, (2) commercial consumers, (3) industrial consumers and direct industrial customers, and (4) direct industrial consumers served under contracts between El Paso and such direct industrial customers presently or hereafter in effect and providing for a priority subordinate to the three stated above. To accomplish the necessary changes in service the El Paso proposal would require each of its customers to execute a new service agreement effective for the interim period. EOC direct industrial customers wishing to remain in priority three would have to agree to pay 5c/Mcf above the existing rate for the privilege of receiving gas on a firm basis. Gas not paid for in the above manner would be delivered under priority four.

The Commission Staff curtailment plan rather than using reliable main line capacity as the point of departure would rely on the delivery obligations in the existing contracts. Staff would also limit annual takes of EOC

distributors and industrials to actual annual takes for the 12 months ended June 30, 1972, since the existing contracts do not provide for annual limitations. The priorities of service under the Staff plan would be based on end use as follows: (1) residential, small commercial (under 50 Mcf), and residential needs related to direct and indirect industrial sales; (2) large commercial and those volumes of industrial gas required for plant protection and feed stock or process gas; (3) all other industrial requirements. The Staff plan would also provide for emergency environmental considerations whereby customers could apply for emergency gas from El Paso based on certification by a local air pollution control agency that an emergency based on EPA guidelines existed.

JM proposed a curtailment plan which it believed would be least disruptive to ultimate gas consumers during the interim period while a permanent plan was worked out. JM would assign the lowest priority to gas used as boiler fuel and within the boiler fuel category boilers with existing alternate fuel capacity would be ranked from the largest to the smallest to reflect their fuel efficiencies and curtailed from the largest to the smallest in that group. JM believes that such curtailment would take care of the immediate problem envisioned by El Paso and alternate fuel availability would be the real criteria for determining curtailments.

SoCal and PG&E believe that for this winter they can operate under El Paso's existing curtailment plan through the use of the storage capacity of SoCal and PG&E. Under this plan California distributors to the extent possible would allow El Paso to reduce deliveries to them

during emergency periods and they would withdraw gas from their own storage to take up the difference. For this service, SoCal and PG&E would expect the gas to be redelivered within 6 months and also that El Paso would pay 30c/Mcf for the gas taken from storage which purportedly represents the cost of one storage cycle.

We have carefully considered each of these plans and combinations thereof, keeping in mind that any plan ordered would be for the 1972-1973 winter only. We would emphasize that any plan ordered now is being adopted under the pressure of time and is not intended in any way to indicate the direction of the determination of a long range plan now pending before the Administrative Law Judge. Based upon a consideration of the record before us and the briefs and reply briefs filed by the various parties we find that the plan proposed by the Commission Staff would be the most equitable but also find that it should be modified to use a priority system less disruptive and more easily implemented. In so doing we are not requiring the installation of duel fuel capacity during the interim period. We do recognize that over the long term, the interim plan we have adopted may operate as a disincentive to the installation of alternate fuel capacities. In addition, we believe that in calculating these priorities for this interim period the storage withdrawal adjustments proposed by Staff adds an additional complication which should be eliminated.

In rejecting the El Paso proposal as an interim plan we note first that the El Paso proposal would require customers to enter into entirely new contracts for the interim period. To the extent possible, we believe exist-

ing relationships should be preserved until the long range permanent plan is ready to go into effect. In addition, we believe that the Staff plan gives greater consideration to end use while preventing the abuse of the interim curtailment procedures by any of the customers who under El Paso's plan could attach new residential and commercial customers. The discrimination between priority 3 and priority 4 customers is obvious in the El Paso plan.

Although we are not adopting the plan proposed by JM, we believe that its concepts based on end use and a minimum of disruption during the interim period are steps in the right direction. We have, therefore given consideration to this plan in formulating our own.

With regard to the plan proposed by SoCal and PG&E we find that it would just be too little and too late. It would leave the presently effective El Paso curtailment plan as the only valid tariff and we have already found that that contains inequities far beyond anything we can continue to permit. In addition, the SoCal, PG&E plan does not assure service to human needs customers but promises to do its best with what is available from storage. It would appear to be at best just a plan to assure California customers that they would be unaffected by any El Paso curtailments.

The necessary tariff provisions to carry out our determination made herein should be submitted by El Paso within 30 days and will be accepted subject to our approval as to form. These provisions will be in effect until October 31, 1973, or until a permanent plan is finally approved by this Commission, whichever is earlier. If

curtailments are necessary prior to the filing of the interim provisions El Paso should curtail all industrials ratably.

The remaining question before us involves the claim of Wilcox and AEPCO for extraordinary relief and total exemption from any curtailment plan during the coming winter. AEPCO, supported by Wilcox, alleges that it is unable to purchase fuel oil sufficient to satisfy its projected electric generation requirements during the coming year if El Paso's curtailments are actually put into effect. Based on the record made by AEPCO, we cannot find that it is entitled to the relief which it claims.

The AEPCO evidence shows that it has current storage capacity of 2.8 million gallons of oil as an alternative fuel and that this storage is now filled. If maximum curtailments were to be in effect, this storage would fall far short of the necessary fuel needed by AEPCO. AEPCO claims that it has been unable to enter into a contract for the necessary additional fuel oil and that in any event the transportation of such fuel oil would be extremely difficult because of the location of AEPCO's plant. The record shows, however, that AEPCO refused to enter into a contract with one supplier for 4 million gallons because the supplier would make monthly deliveries rather than at AEPCO's option. In addition, AEPCO was more given to excuses for not negotiating for additional fuel rather than proving a failure of a bona-fide effort. In this connection we note that many of the other customers of El Paso such as the copper companies showed that they had been able to find alternative fuel supplies for the coming winter and we cannot

find that AEPCO has exhausted all of its possibilities. AEPCO is, of course, free to renew its motion if at some later period it is able to make a more persuasive showing of an entitlement to the relief it seeks.

*The Commission further finds:*

(1) The currently effective curtailment provisions of El Paso's tariff are discriminatory under Sections 4 and 5 of the Natural Gas Act and it is appropriate that interim curtailment provisions be substituted pending a final determination of permanent just and reasonable tariff provisions.

(2) For the interim period ending October 31, 1973, or the date of final Commission order in these proceedings, whichever is first, we prescribe the following categories of curtailment priorities for El Paso's Southern Division, which are found to be reasonable, necessary, appropriate and in the public interest. The basic objectives of these categories are (1) to protect deliveries for residential and small volume commercial consumers who cannot be safely curtailed on a daily basis and (2) to require, as the initial level of curtailment, reduction in deliveries for large volume boiler fuel usage where alternate fuels are available:

*Priority 1.* Residential, small commercial (less than 50 Mcf on a peak day) and residential needs associated with industrial requirements served directly or indirectly.

*Priority 2.* Large commercial requirements and industrial requirements for plant protection, feedstock and process needs.

*Priority 3.* All industrial requirements not specified in Priorities 2, 4 and 5.

*Priority 4.* Industrial requirements for boiler fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where existing alternate fuel capability is present.

*Priority 5.* Industrial requirements for large volume, in excess of 3,000 Mcf per day, but more than 1,500 Mcf per day, where existing alternate fuel capability is present.

(3) Delivery reduction in each subordinate priority shall be complete before deliveries for requirements in a higher priority are curtailed.

(4) Industrial requirements of El Paso's direct and resale customers shall be curtailed ratably within each priority.

(5) Curtailment shall be implemented daily as required by operating conditions on the Southern Division.

(6) A daily limitation on sales shall be imposed consistent with the Maximum Daily Delivery Obligation as provided within the currently effective east-of-California contracts and service agreements. The California customers are adequately limited at present by the Maximum Daily Contracted Demand of the existing agreements.

(7) Determination of El Paso's share of the California market for purposes of this interim curtailment plan shall not include a component for storage gas attributable to any previous delivery by El Paso.

(8) Implementation of our plan will require certain market data which El Paso may not have in the required

form. El Paso shall secure all data necessary to effectuate compliance herewith, and shall file interim tariff provisions consistent therewith, acceptable to the Commission, on or before November 30, 1972.

(9) In the event El Paso should need to curtail deliveries for any reason before November 30, 1972, it shall be required as part of the emergency procedure to implement ratable curtailment of the industrial component of its direct and resale markets, including El Paso's share of the California market, using the best available data as basis for determination of industrial requirements; and shall protect residential and small commercial consumers.

(10) The motion of Wilcox and AEPCO for extraordinary relief should be denied.

*The Commission orders:*

(A) El Paso shall file revised tariff sheets consistent with the above findings within 30 days which, subject to our approval shall become effective immediately upon filing.

(B) Such tariff sheets shall be effective until October 31, 1973, or until a permanent curtailment provision is approved, whichever is earlier.

(C) Prior to filing the revised sheets any necessary curtailments shall be carried out under finding number 9.

(D) The motion by Wilcox and AEPCO for extraordinary relief is denied.

(E) The record certified to us by the Presiding Administrative Law Judge is remanded for his consideration in determining a permanent curtailment plan.

## Appendix 4

# FEDERAL POWER COMMISSION
# OPINION NO. 634-A
# EL PASO NATURAL GAS COMPANY,
# DOCKET NO. RP72-6

OPINION AND ORDER CLARIFYING OPINION, DENYING MOTIONS FOR STAY, AND DENYING REHEARING

(Issued December 15, 1972)*

*Syllabus*

Commission *makes effective* interim curtailment plan filed by pipeline pursuant to Opinion No. 634; *makes certain clarifications* in said Opinion and order; and *denies* motions for stay and for rehearing.

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Pinkney Walker and Rush Moody, Jr.

WALKER, *Commissioner:*

Since we issued our Opinion No. 634 on October 30, 1972, 48 FPC 931, prescribing interim curtailment plan for El Paso Natural Gas Company (El Paso) a number of the parties to the proceeding have made various filings requesting stays, clarification, modification and rehearing. Attached as Appendix A to this Opinion is a chronological list of the various filings we have received in connection with Opinion No. 634. On November 29, 1972 we issued

*Order issued February 7, 1973 denying motion for stay; see also Order on protests, motions for clarification and applications for rehearing issued February 7, 1973, 49 FPC 354, 355.

an order staying the effective date of the filings to be made by El Paso on November 30, 1972 until such time as we could consider the many filings made by the parties. On November 30, 1972 El Paso filed the revised tariff sheets as required by Opinion No. 634 and we now have tariff as well as the many filings before us.

Many of the filings contain arguments made to us prior to the issuance of Opinion No. 634 and in most cases we see no reason to discuss these all over again. However, certain of the filings raise questions which we believe merit further discussion and in some cases clarification with regard to our meaning in Opinion No. 634.

In its motion of November 20, 1972 for partial stay or immediate clarification, El Paso contends that certain ambiguities are present in our Opinion which require clarification before the tariff sheets may be implemented. Four questionable areas were noted by El Paso as requiring immediate clarification in order to proceed with the curtailment plan as ordered. These areas concern primarily the lowest categories of service since this is the service that will be immediately affected by the curtailments.

The four areas of concern and El Paso's interpretation are as follows:

(a) *Alternate Fuel Capabilities:* El Paso believes that there may be some ambiguity in the use of the terms "alternate fuel capabilities" and "alternate fuel facilities." El Paso questions whether an industrial customer having alternate fuel facilities in existence should be regarded as having "existing alternate fuel capability." The revised tariff sheets will utilize the term "where existing alternate fuel facili-

ties are present" in the definition of Priorities 4 and 5.

(b) *Boiler Fuel Use:* According to El Paso, several customers have raised the question as to whether or not the term "boiler fuel use" as it appears in the definition of Priorities 4 and 5 service included that used for gas-powered turbines utilized for electric generation and any other direct fired application wherein alternate fuel capabilities exist. The revised tariff sheets will indicate that Priorities 4 and 5 do *not* include the above uses within the definition of boiler fuel.

(c) *Requirement v Scheduled Deliveries:* El Paso questions the reference to the word "requirement" as meaning total "all out" requirement or scheduled use on a given day. In this regard El Paso has interpreted the Commission to mean those quantities which the customer would schedule for deliveries. Thus the revised tariff sheets will provide for "scheduled deliveries up to the Maximum Daily Delivery Obligation."

(d) *Grouping of Individual Delivery Point Delivery Obligation:* El Paso believes that a literal interpretation of the statement "Maximum Daily Delivery Obligation, as provided within the currently effective east-of-California contracts and service agreements" might preclude it from utilizing a customer's individual delivery point quantities at other delivery points where such quantities could best be utilized. However, the revised tariff will provide for such flexibility.

With respect to item (a), El Paso is correct in the use of the term "alternate fuel facilities." A review of the staff plan and testimony which was adopted by us indi-

cates that El Paso's interpretation is consistent with the position and intent of the staff in advocating its plan. We realize that there may be situations where alternate fuel facilities exist but for good reason the capability does not exist. As noted in other curtailment cases, any party who finds itself in a position such as this and can clearly show the Commission that such a situation exists is free to ask for extraordinary relief at any time.[1]

With respect to item (b) (Boiler Fuel Use), we note that this pertains to the portion of the interim curtailment plan attributable to the proposals of the Johns-Manville witness and we realize there is no clear cut statement by either staff or the Johns-Manville witness as to the proper placement of gas turbine electric generation within the priorities of service as established by Opinion No. 634. While our basic intent in issuing Opinion No. 634 was to cause a minimum of disruption by curtailing large gas users with alternate facilities first, we are not ready to say at this time that gas powered turbines along with other direct fired applications should be considered boiler fuel for purposes of curtailment. Thus, we agree that El Paso has properly placed such uses in Priority 3. We would note, however, that this exclusion of these uses for Priorities 4 and 5 should not be used to divert boiler fuel to increased or new usage in turbines or direct fired applications during this interim period.

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[1]As a part of their petition of November 30, 1972, the City of Willcox, Arizona, and Arizona Electric Power Cooperative, Inc. have included an amended motion for extraordinary relief. This will be set for hearing by separate order.

With regard to item (c), again we believe El Paso's interpretation is consistent with the staff position but it may also be that some further clarification is necessary since certain parties still seem to be confused as to its meaning. In providing that the basis for measuring curtailments will be the requirements up to the maximum of daily delivery obligation, it is our understanding and intent that this means whichever is the lesser. Thus the daily requirements will be used as a measure only if they are less than El Paso's maximum daily delivery obligation. In connection with this interpretation, we note that certain east-of-California parties who have not renegotiated their contracts with El Paso in recent years have been using substantial amounts of overrun gas to meet human needs requirements. This is made quite clear by the December 1, 1972 motion of the City of Mesa, Arizona for clarification or rehearing. Again we would note that where a party finds itself in a position such as that alleged by Mesa the door is open for a petition for extraordinary relief.

With regard to item (d), we find that the imposition of conjunctive billing as proposed by El Paso is not justified at this time, and could well result in increased industrial gas usage by those customers having a number of delivery points. Certainly it could result in discrimination against those customers, including California, who have only one delivery point. El Paso should eliminate this provision from the interim plan filed on November 30, 1972.

Two additional points raised by various parties which were not discussed in Opinion No. 634 involve annual

limitations and overrun penalties. While we did not discuss or prescribe annual limitations in Opinion No. 634, we note that, consistent with the staff position at the hearing, El Paso has provided such limitations in its tariff filing based on the year ending July 1, 1972. Since this is consistent with the staff curtailment plan we expressly approve it. With regard to penalties for unauthorized overruns, we note that El Paso has never had them in its tariff and we do not consider it appropriate to institute them in an interim proceeding. As we also noted above, a number of customers have not recently revised their contracts and have been making substantial overruns for the use of human needs customers. While some provision for preventing unauthorized overruns may well be necessary in a permanent curtailment plan, we do not believe we should prescribe one at this time.

Another issue raised by a number of the parties regards our alleged failure to give adequate consideration to environmental matters in prescribing this interim curtailment plan. Our action in prescribing an interim plan was required as an emergency measure because of imminent curtailment on El Paso's system; in providing all parties with an opportunity to be heard before issuing an order, we spoke against the background of our August 22, 1972, 48 FPC 371, order in this docket which stated, in part:

> We do not intend in any way to restrict the scope of our analysis of the environmental impact of El Paso's proposed curtailment plan. Environmental evidence will be presented in this case by any party so desiring. Environmental issues will be briefed with all other relevant issues. The process of analysis of

> environmental issues will be embodied in the Examiner's initial decision, and will be considered by the Commission, together with all relevant evidence in the record, before it issues its final decision in this and other curtailment proceedings.

In Opinion No. 634 we directed the filing of tariffs which permitted deviation from curtailment procedures when required by environmental problems. Those tariffs have now been filed and are in effect. For the reasons stated in our August 22nd order, and with regard to the limitations of time and the record before us, we concluded that our interim orders could go no further. We will continue to expect, however, the development of a complete environmental record in the hearings on El Paso's permanent curtailment plan, in accord with our August 22nd order.

Finally, many of the parties have made the point that as a result of this plan many customers who should be planning for alternate facilities will no longer have any incentive to do so. While we recognize that this may result, we would warn all customers that this is an interim plan only and those who should be installing alternate facilities but fail to do so are taking a substantial risk of being cut off with no alternative when a permanent plan is approved.

*The Commission further finds:*

(1) The assignments of error and grounds for rehearing or modification set forth in the various applications, petitions, and motions listed in Appendix A present no facts or legal principles which would warrant any change in or modification of the Commission's Opinion No. 634

and order issued October 10, 1972 except insofar as that Opinion and order have been clarified above.

(2) It is imperative that the interim curtailment plan be made effective at once and the various motions for stays should be denied.

*The Commission orders:*

(A) The interim curtailment plan ordered in Opinion No. 634 as filed by El Paso on November 30, 1972 is made effective on the date of the issuance of this Opinion and order.

(B) The various applications, petitions and motions for stays, modification, and rehearing of Opinion No. 634 are denied.

COURT, U. S.

FIL

JUN 21

MICHAEL RODAK,

Nos. 73-1772, 73-1776, 73-1790, 73-1825

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

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SOUTHERN CALIFORNIA GAS COMPANY, ET AL.,
*Petitioners*

*v.*

FEDERAL POWER COMMISSION

---

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## BRIEF FOR AMERICAN SMELTING AND REFINING COMPANY, COMPANIA MINERA DE CANANEA, S.A. de C.V., INSPIRATION CONSOLIDATED COPPER COMPANY AND KENNECOTT COPPER CORPORATION IN OPPOSITION

---

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June, 1974

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### JURISDICTION

The judgment of the Court of Appeals was entered on January 21, 1974. Petitions for rehearing were denied on February 25, 1974. The petitions for a writ of certiorari in Nos. 73-1772, 73-1776, 73-1790 and 73-1825 were filed on May 24, 1974, May 28, 1974, May

29, 1974 and June 3, 1974 respectively. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the National Gas Act, 15 U.S.C. § 717r(b). Because the petitions in Nos. 73-1790 and 73-1825 were not filed within the time specified in 28 U.S.C. § 2101(c), those petitions are jurisdictionaly defective.

## QUESTIONS PRESENTED

1. Whether issues raised by interim curtailment orders issued by the Federal Power Commission and soon to be replaced by permanent orders are moot.

2. Whether the Federal Power Commission acted properly in prescribing a non-discriminatory interim curtailment plan to be observed by El Paso Natural Gas Company after finding that El Paso's then effective plan was discriminatory.

3. Whether the Federal Power Commission was required to issue an Environmental Impact Statement before responding to the imminent emergency on El Paso Natural Gas Company's system.

## STATEMENT

El Paso Natural Gas Company is a natural gas company subject to the jurisdiction of the Federal Power Commission. El Paso's Southern Division System, which extends from Texas to the Eastern borders of California, supplies all the natural gas requirements of several distributor and direct industrial customers located in the States of Texas, New Mexico, Arizona and Nevada and a portion of the requirements of two California distributors, Pacific Gas

and Electric Company (PG&E) and Southern California Gas Company (SoCal), which in turn sell gas for residential, commercial and industrial use.

The East of California direct industrial customers include respondents American Smelting and Refining Company, Compania Minera de Cananea, S.A. de C.V., Inspiration Consolidated Copper Company and Kennecott Copper Corporation (ASARCO, *et al.*), which are generally engaged in the mining and smelting of copper ores in the States of Texas, New Mexico and Arizona and in Northern Mexico. ASARCO, *et al.*, have purchased their natural gas requirements from El Paso since the 1940's pursuant to long term firm contracts requiring El Paso to deliver the smelters' natural gas requirements up to certain specified daily amounts. The operations of these companies contribute significantly to the economy of the Southwestern United States and Northern Mexico.

Pursuant to Commission Order No. 431, 36 Fed. Reg. 7505, El Paso filed in May, 1971, proposed changes in the curtailment procedures set forth in its FPC Gas Tariff. Hearings were ordered by the Commission on the proposed changes and were completed in June, 1972. In August, 1972, while the matter was being briefed to the presiding Administrative Law Judge, El Paso, anticipating a need to impose service curtailments beginning November 1, 1972, but not wanting to do so pursuant to either its existing procedures or its proposed revisions—at least before they were sanctioned by the Commission—requested the Commission to prescribe interim procedures to govern curtailments on its Southern Division System until a permanent plan was settled on.

Hearings were reconvened on the need for and the form of interim curtailment procedures. Following briefing, the Commission issued Opinion No. 634, 48 F.P.C. 931 (1972), which found, initially, that El Paso's existing procedures required that curtailments be imposed in the following order:

> "(a) best efforts gas; (b) irrigation gas; (c) direct industrial gas; (d) industrial gas of distributors east of California (EOC); (e) commercial gas of distributors EOC; (f) residential gas for distributors EOC; (g) gas sales to California customers under Rate Schedule G." 48 F.P.C. at 934.

The Commission concluded that this curtailed scheme [1] was unlawful and ordered El Paso, pending approval of a permanent plan, to curtail gas deliveries ratably to all its customers on the basis of the following end use priorities, with the lowest priority to be curtailed first:

Priority 1. Residential, small commercial (less than 50 Mcf on a peak day) and residential needs associated with industrial requirements served directly or indirectly.

Priority 2. Large commercial requirements and industrial requirements for plant protection, feedstock and process needs.

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[1] While ASARCO, *et al.*, do not agree with the Commission's interpretation of the prior procedures, the Commission acted properly on that interpretation, and therefore the result reached was correctly affirmed by the Court of Appeals. For this reason, among others, ASARCO, *et al.*, oppose the untimely petition filed by the City of Willcox and the Arizona Electric Power Cooperative, Inc.

Priority 3. All industrial requirements not specified in Priorities 2, 4 and 5.

Priority 4. Industrial requirements for boiler fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where existing alternate fuel capability is present.

Priority 5. Industrial requirements for large volume (in excess of 3,000 Mcf per day, but more than 1,500 Mcf per day) where existing alternate fuel capability is present. 48 F.P.C. at 939.

After the Commission denied rehearing, 48 F.P.C. 1369, several parties initiated review proceedings in the Court of Appeals.

Although it remanded certain specific features of the interim program to the Commission, the Court of Appeals for the District of Columbia Circuit affirmed the Commission's conclusion that El Paso's existing procedures were unlawful and upheld the Commission's authority to prescribe end use curtailment priorities to be applied ratably to all customers of the pipeline. Several petitions for rehearing were denied and petitions by PG&E, SoCal and San Diego Gas & Electric Company, a customer of SoCal (the California petitioners), and by the City of Willcox and Arizona Electric Power Cooperative, Inc. (AEPCO), followed.

## ARGUMENT

### A. The Petitions Raise Issues Which Will Be Mooted in the Near Future.

The petitions concern Commission orders which specifically are to remain in effect only until such time as a permanent curtailment plan is prescribed by the

Commission. On June 14, 1974, the Commission issued its Opinion No. 697, prescribing a *permanent* curtailment plan to be followed by El Paso. Pursuant to Ordering Paragraph I, Opinion No. 697 will become effective "within 60 days after its issuance, or, in the event applications for rehearing are filed, upon the date of a final order on rehearing in this proceeding, whichever is the later." Issues raised by the interim plan will thus be mooted in the very near future, and the petitions should accordingly be dismissed when Opinion No. 697 becomes effective. *De Funis* v. *Odegaard*, — U.S. —, 42 U.S.L.W. 4578 (1974); *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). If the permanent curtailment plan contains features which petitioners deem unsatisfactory, they may seek judicial review thereof pursuant to Section 19(b) of the Natural Gas Act, 15 U.S.C. §717r(b).

**B. In Upholding the Commission's Interim Orders, the Court of Appeals Did Not Deviate From This Court's Decisions.**

In upholding the Commission's action, the Court of Appeals did not deviate at all from the decisions of this Court in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621; *Permian Basin Area Rate Cases*, 390 U.S. 747 (1969); or *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1955), concerning the Commission's obligations in curtailment proceedings or its duty to set asde contractual provisions inimical to the public interest. Neither does the Court of Appeals' decision create a conflict with another circuit, as some petitioners suggest. Accordingly, the several petitions should be denied.

In *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), this Court held that Sections 1(b) and 16

of the Natural Gas Act, 15 U.S.C. §§ 717(b) and 717o, conferred on the Commission broad authority to regulate service curtailments by pipelines subject to its jurisdiction. *Id.* at 638, 642. The substantive standard for evaluating curtailment programs, it was held, was Section 4(b), which provides:

> "(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service."

Also important to this case is Section 5(a) of the Act, which was invoked by El Paso's August, 1972, motion and provides in relevant part as follows:

> "(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: . . ."

The California petitioners do not seriously contend that the Commission erred in concluding that El Paso's existing curtailment procedures were unlawfully discriminatory.[2] Nor do they argue that the interim non-discriminatory pro rata curtailment procedures promulgated by the Commission are violative of Section 4(b). For neither of these positions would be supportable in fact or in law.

What the California petitioners do urge, however, is that the Commission went too far in remedying the undue discrimination embodied in El Paso's existing curtailment procedures. After assuring that gas service to EOC residential and commercial customers would be given the same priority as similar service in California, they say, the Commission should simply have let El Paso curtail industrial service in accordance with its existing procedures. Under El Paso's and the Commission's interpretation of those procedures,[3] all service to East of California direct industrials would have been curtailed for much of the 1972-

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[2] SoCal argues that the Commission's findings that there was a substantial likelihood that curtailment of EOC residential or commercial requirements would occur was not supported by the evidence. SoCal's position rests solely on El Paso's estimate of *average* day, rather than *peak* day, curtailments of EOC residential or commercial requirements. El Paso's evidence was that on extremely cold days, which might occur for four or five consecutive days, there would be curtailment of 226,000 Mcf of residential-commercial service. (R. 6698; 9561.) While the Court of Appeals noted that there was no certainty that this would result in curtailment of residential service, it affirmed, as supported by substantial evidence, the Commission's conclusion that residential and commercial service together would be curtailed on very cold days. (Slip Op. at 25-28.)

[3] But see note 1 *supra*.

73 winter (and undoubtedly to an even greater extent in the 1973-74 winter), while industrials served by EOC distributors would have fared only slightly better. (R. 9561.) At the same time, PG&E and SoCal would have received, day after day, one-hundred percent of their contract entitlement, much of which would have been sold to industrial users. In short, the California petitioners were advocating disparate treatment by El Paso which would have favored its California indirect industrial customers at the expense of its East of California direct customers.

The complete answer to the position asserted by the California petitioners is that the Commission had an obligation to prescribe a nondiscriminatory curtailment plan for El Paso, not merely one which eliminated only the most objectionable features of the existing plan, *i.e.*, potential curtailment of EOC residential and commercial service before El Paso's deliveries to PG&E and SoCal were cut by 1 Mcf.[4] Section 5(a), which the Court has held may be used to implement the Commission's curtailment authority, *FPC* v. *Louisiana Power & Light Co., supra,* 406 U.S. at 643, provides that after the Commission finds an existing tariff provision unlawful, it "shall determine the *just and reasonable* . . . rule, regulation, practice, or contract to be thereafter observed and shall fix the same by order . . ." (Emphasis added.) And, of course, in prescribing the plan, the Commission had to observe

[4] In addition to their grave concern regarding predicted curtailment of EOC residential-commercial service, the Commission and the Court of Appeals plainly considered the discriminatory, complete curtailment of gas deliveries to EOC industry to be a significant indication of the unlawfulness of El Paso's existing procedures. (48 F.P.C. at 934-35; Slip Op. at 28.)

the nondiscrimination requirements of Section 4(b). *FPC* v. *Louisiana Power & Light Co., supra,* 406 U.S. at 642-43. In view of these governing criteria, it is readily apparent that the Commission did not act unlawfully in prescribing an end use curtailment plan which accorded similar treatment to all of El Paso's customers. Indeed, one wonders what other lawful order the Commission could have entered under the relevant statutory and case law.

The California petitioners' characterization of the Commission's action as (1) unjustifiably upsetting their contractual expectations of a firm gas supply and (2) unexpectedly shifting volumes of gas from industrial users in California to similar users in states East of California is simply inflammatory rhetoric which does not advance analysis of the issues. The EOC direct industrials, such as *ASARCO, et al.,* enjoy, under their contracts with El Paso, service which is no less firm than El Paso's gas service to PG&E and SoCal. The only difference is the not unusual provision, that being industrials, ASARCO, *et al.,* could be interrupted in emergency situations *to ensure continued service to the "domestic" customers served by El Paso's distributor customers.* (*E.g.* R. 10725-26, 10761-62, 10888-89, 10941-42). ASARCO, *et al.'s* contracts do *not* provide that service to them can be cut off permanently merely to ensure continued gas deliveries to PG&E and SoCal for redelivery to their large steam electric generating plant customers.

The hard fact is that the severe and worsening natural gas shortage currently affecting the United States as a whole and El Paso in particular has resulted in the frustration of the contractual expecta-

tions of all of El Paso's firm customers, whether located in California or in States to the East. Those customers, including ASARCO, *et al.*, had relied on a continuing adequate supply of gas from El Paso in making plans, commitments and capital investments. That El Paso's gas shortage has demonstrated that such reliance was unjustified is hardly a sufficient reason for adopting the California petitioners' suggestion that the entire burden of the shortage be borne by EOC customers.[5]

It was the Commission's unenviable task to devise in a short time interim procedures which would spread the shortfall between supply and demand in a nondiscriminatory and nonpreferential manner. In issuing its Orders designed to accomplish this goal, the Commission did not set aside the California petitioners' contractual expectations to any greater degree than it did those of the EOC customers and did not, as the California petitioners urge, shift volumes of gas from California to the East. Rather, the Commission simply ordered that El Paso's systemwide shortage be apportioned ratably among those served by that system, and, as a result, *all* customers are receiving *less* gas than they are contractually entitled to.

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[5] Even assuming the validity of El Paso's view of its existing procedures (although El Paso historically had not acted in accordance with that view), the procedures were not in conformity with the contract rights of ASARCO, *et al.* In any event, curtailment procedures historically utilized only during severe winter weather conditions when El Paso's pipeline capacity was insufficient to satisfy all of its customers' contract entitlements were hardly dispositive when the Commission undertook to devise procedures for dealing with severe daily curtailments resulting from a chronic gas supply shortage.

In view of the foregoing, it is plain that the Commission did not deal any differently with the California petitioners' contract rights than it did with those of, for instance, ASARCO, *et al.* In any event, the Commission certainly has the inherent authority to set aside, in connection with the exercise of its curtailment authority, contractual provisions subject to its jurisdiction which it finds are not in the public interest. *FPC* v. *Louisiana Power & Light Co., supra,* 406 U.S. at 646; *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra,* 350 U.S. at 344; *Permian Basin Area Rate Cases, supra,* 390 U.S. at 784. Utilizing these standards, it was entirely appropriate for the Commission to set aside the contracts between El Paso and PG&E and SoCal to whatever extent they may have provided that gas would be delivered to PG&E and SoCal for resale to industrial consumers while deliveries to the firm EOC industrials were being curtailed. Such an arrangement, which would result in gross discrimination between deliveries by El Paso for industrial gas consumers in California and States East of California, is clearly contrary to the public interest, especially in a time of acute gas shortage like that currently being experienced by El Paso's Southern Division System. In sum, one group of a pipeline's customers cannot be heard to invoke certainty of contract as a vehicle for preserving its own contract rights at the expense of those of another similarly situated group of customers.

**C. The Court of Appeals' Decision Is Not in Conflict with International Paper Company v. Federal Power Commission.**

The decision of the Court of Appeals is not in conflict with that of the Court of Appeals for the Fifth Circuit in *International Paper Co.* v. *FPC,* 476 F.2d

121 (5th Cir. 1973). In that case, the court accepted as settled that a valid Commission curtailment order would, in and of itself, override and limit pro tanto the pipeline's contractual obligation to deliver so many cubic feet of gas per day. 476 F.2d at 123. Indeed, an impossible situation would result if this effect were not given Commission curtailment orders.

The Fifth Circuit then considered whether such an order would also automatically insulate the pipeline from all potential damage liability, either for failure to deliver the agreed upon quantities, or under substitute fuel clauses. It was only in connection with these latter issues, which were not raised in the proceedings below, that the Fifth Circuit required the specific findings which some petitioners suggest the Commission was required to make in this case.

Both the Fifth Circuit[6] and the D.C. Circuit[7] recognized the difference between the curtailment and damages issues, and the D.C. Circuit properly concluded that the Commission had not acted contrary to the *International Paper* decision.

In any event, the Commission has plainly made any findings arguably required by *International Paper.* The Commission found, based on substantial evidence, that El Paso's existing curtailment plan was unduly discriminatory (the converse of preferential) and that the curtailments required thereby (*i.e.,* cessation of *all* natural gas service East of California before 1 Mcf of curtailment to PG&E or SoCal) made abrogation

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[6] 476 F. 2d at 126-29.

[7] Slip Op. at 20-21.

of that plan necessary in the public interest. For these reasons, the decision below has created no conflict between circuits.

**D. In the Circumstances Facing It, the Commission Was Not Required To Issue an Environmental Impact Statement.**

Review should not be granted merely because the Court of Appeals upheld the Commission's decision to promulgate interim curtailment procedures without first issuing an Environmental Impact Statement or stating why it was impractical to do so. While ASARCO, *et al.*, believe that the National Environmental Policy Act, 42 U.S. § 4321 *et seq.*, requires the Commission to issue such a statement or explanation in conjunction with a *permanent* curtailment plan, the circumstances underlying the issuance of the *interim* plan—the need for expeditious action to ensure that anticipated service curtailments would be administered in a just and reasonable manner—simply precluded the Commission from considering the environmental issue beyond providing for an exemption from curtailment in environmental emergencies. A system shortage was about to materialize and the Commission could have done nothing to stave it off while it considered environmental matters. In these circumstances, the Court of Appeals properly concluded that the Commission was temporarily excused from complying with NEPA, which requires that, "to the fullest extent *possible*," [8] impact statements will be issued. *See also Atlanta Gas Light Co.* v. *FPC*, 476 F.2d 142, 150 (5th Cir. 1973).

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[8] 42 U.S.C. § 4332(2)(c) (emphasis added).

## CONCLUSION

For the foregoing reasons, the several petitions for writs of certiorari should be denied.

Respectfully submitted,

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June, 1974

SUPREME COURT, U.S.

FILED

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MICHAEL RODAK, JR.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 19

Nos. 73-1772, 73-1776, 73-1790, 73-1825

SOUTHERN CALIFORNIA GAS COMPANY,
PACIFIC GAS AND ELECTRIC COMPANY,
SAN DIEGO GAS AND ELECTRIC COMPANY,
CITY OF WILLCOX, et al.,

v.

Petitioners,

FEDERAL POWER COMMISSION,

Respondent.

On Petitions for Writs of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS
ARIZONA PUBLIC SERVICE COMPANY, SOUTHERN UNION
GAS COMPANY, SOUTHWEST [illegible] CORPORATION
AND TUCSON GAS & ELECTRIC COMPANY


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SOUTHERN CALIFORNIA GAS COMPANY,
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v.

FEDERAL POWER COMMISSION,

*Respondent.*

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On Petitions for Writs of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

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## BRIEF IN OPPOSITION FOR RESPONDENTS ARIZONA PUBLIC SERVICE COMPANY, SOUTHERN UNION GAS COMPANY, SOUTHWEST GAS CORPORATION AND TUCSON GAS & ELECTRIC COMPANY

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Arizona Public Service Company, Southern Union Gas Company, Southwest Gas Corporation, and Tucson Gas & Electric Company, respondents herein and intervenors in the court below, oppose the captioned petitions for writs of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered on January 21, 1974, in the matter styled *American Smelting and Refining Company, et al. v. Federal Power Commission.*

## QUESTIONS PRESENTED

1. Whether the issues raised by interim emergency orders of the Federal Power Commission are moot by reason of the issuance of permanent orders superseding such?

2. Whether the Federal Power Commission's mandate under Sections 4(b) and 5(a) of the Natural Gas Act to proscribe undue discrimination in the curtailment of natural gas service is limited to protecting residential and commercial needs from preferential practices, or whether such obligation to insure non-discriminatory practices covers industrial needs as well?

## STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, 15 USCA, §717, *et seq.* are Sections 4(b) and 5(a) which provide:

Section 4

* * * * * * *

"(b) No natural gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service." 15 USCA §717c(b)

Section 5

* * * * * * *

"(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas

distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: ***Provided, however***, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates." 15 USCA §717d(a)

## STATEMENT

The instant matter involves orders of the Federal Power Commission (Commission) establishing interim emergency priorities and procedures to ration natural gas supplies on the Southern Division System of El Paso Natural Gas Company (El Paso), an interstate pipeline subject to the Commission's jurisdiction under the Natural Gas Act, ***supra***, pending the Commission's final decision upon the appropriate permanent prescription to govern curtailment of service. The controversy here involved concerns whether the Commission properly found that all customers served by El Paso should be curtailed in the same manner, or whether certain claimed contractual preferences should prevail.

Arizona Public Service Company, Southern Union Gas Company, Southwest Gas Corporation, and Tucson Gas &

Electric Company are natural gas distributors serving approximately 668,000 consumers throughout the so-called east-of-California region, consisting of west Texas, New Mexico, Arizona, and southern Nevada. El Paso's deliveries to the above-listed distributors pursuant to firm contracts constitute the sole source of natural gas available for resale to such consumers, except for certain quantities purchased by Southern Union Gas Company from other suppliers. In addition to such distributors' dependence upon El Paso for their resale requirements, Arizona Public Service Company and Tucson Gas & Electric Company are dependent upon El Paso's firm direct sale deliveries as their sole source of natural gas for their electric generation facilities, which provide electric energy to some 432,000 consumers.

The east-of-California region, presently consisting of 30 resale distributor customers and 21 direct sale industrials served by El Paso, has received firm service for over four decades. Such service commenced in the early 1930's as El Paso extended its pipeline facilities westward from the natural gas production areas in west Texas through southern New Mexico and Arizona to a point of termination near Phoenix, Arizona (R. 22).

The east-of-California region's dependence upon El Paso's deliveries has developed as a result of both the geology native to the region and El Paso's particular marketing practices. First, the major portion of the east-of-California market served from El Paso's system contains no significant hydrocarbon formations for use either as a source of supply or as storage for volumes to be later withdrawn for peak period needs (R. 1905). Second, by reason of El Paso's early marketing practice, all large-volume industrial requirements in the east-of-California region were served solely on a direct sale basis (R. 1705-1706), with the local distributors thus left to serve residential and small commercial users. As a result, contrary to normal distribution operations wherein a distributor purchases approximately the same quantity from its supplier each day and meets the varying demands of its

temperature-sensitive residential and commercial requirements by interrupting service to its industrial users or withdrawing volumes from underground storage, the east-of-California distributors' purchases necessarily vary with the weather. In recognition of these patterns of service, El Paso has rendered firm service to the east-of-California distributors pursuant to contracts which provide for the satisfaction of their full requirements and do not require a minimum annual level of purchases.

More than 15 years after the above-described service to the region east-of-California was initiated, El Paso extended service to the state of California. Such service, commencing in 1947 to petitioner Southern California Gas Company, which in turn sells to petitioner San Diego Gas and Electric Company, and in 1950 to petitioner Pacific Gas and Electric Company, follows a pattern wholly different than that rendered to the east-of-California region. The two California companies desired that a fixed volume of gas be delivered each day of the year since, unlike the necessarily weather-dependent demands of the east-of-California distributors, the varying demands of their temperature-sensitive residential and commercial users could be met by (1) interrupting service to the large industrial loads in their distribution territories, (2) withdrawing gas stored in large underground reservoirs, and (3) increasing takes from their other sources of supply (R. 22-23; 1763-1764; 7065-7066).

Since the California distributors now purchase approximately 80% of El Paso's annual sales volumes, the extension of service to the California distributors necessarily involved a many-fold expansion of El Paso's previously-existing transmission facilities. The Financial feasibility of such mammoth expansion rested upon the California distributors' representation that they would purchase at approximately 100% of their maximum daily contract entitlement. Hence, the contracts and rate schedules executed for such service provided for (1) a penalty, in the form of a minimum annual bill, to insure that, if such purchases dropped below 91% of contract entitle-

ment, El Paso would nonetheless recover its costs and (2) a rate incentive, in the form of a discount constructed such that each unit above 91% of contract entitlement cost successively less than the preceding unit, to encourage such distributors to purchase 100% of contract entitlement. Pursuant to such rate form, the California distributors have paid a lower unit rate, despite the greater transmission mileage involved, than many of the east-of-California customers.

While the firm service rendered to the two regions was thus vastly different, El Paso's then-existing tariff provisions governing curtailment of service, although disputed by the California petitioners, properly provided for a ***pro rata*** apportionment of any and all curtailment to both California and east-of-California requirements. As specifically referenced in El Paso's Rate Schedule G under which the California companies receive service, Section 11.2 of El Paso's then-existing tariff provided that El Paso's sales to the two California distributors would be curtailed on the same end-use basis as all other deliveries (R. 9781; 12687-12690).[1]

While El Paso's then-existing tariff provided for the ***pro rata*** curtailment of both regions, such tariff purported to distinguish El Paso's liability for curtailing the east-of-California customers' firm contractual demands from that liability accruing from the curtailment of the California distributors. With respect to curtailments occasioned by depletion of supply, Section 9A thereof purported to exempt El Paso from liability to the east-of-California customers, while Section 9B provided that El Paso would not be so exempted from liability as respects the California distributors (R. 9778-9779).

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[1]Section 11.2 states that "in the sale and distribution of natural gas in the States of Arizona, New Mexico, Texas and San Juan County, Utah, . . .", certain procedures govern curtailment (R. 9781). El Paso's sales to the California customers are made in Arizona, and, hence, are covered by Section 11.2's terms. Similarly, Southwest Gas Corporation's distribution operations in Nevada fall within Section 11.2, since El Paso's sales to such company are effected within Arizona.

Except on infrequent occasions during the nearly four decades on full requirements service rendered to the east-of-California region and the 25 years of service to the state of California, El Paso never had the need to utilize the curtailment provisions of such tariff, nor was there any inquiry as to the justness and reasonableness of either the tariff's curtailment provisions or El Paso's interpretation thereof (R. 27). Until 1972, El Paso did not curtail any of its distributor customers, except for isolated ***force majeure*** instances ***Ibid.*** On infrequent occasions of extreme peak demand during such period when El Paso's supplies were not sufficient to satisfy all of its customers' requirements, El Paso did not follow the plain reading of its then-existing tariff providing for the ***pro rata*** curtailment of the industrial requirements served by all of its customers. Instead, evidently mindful that the east-of-California distributors served virtually no industrial loads and equally mindful of the liability that would be incurred if the California distributors were curtailed, El Paso levied such minor curtailments solely upon its direct sale customers (R. 28). The direct industrial customers assumed that curtailment was being implemented on a ***pro rata*** basis to the industrial loads served by distributors, as well, on such occasions, and, hence did not question whether such infrequent, small-volume curtailments were implemented in accordance with the relevant contract and tariff provisions (R. 1444-1445).

In 1971, El Paso's supply projections indicated that the first prolonged and substantial curtailments to be experienced by its system would commence on November 1, 1973, and continue on a daily basis thereafter (R. 28). Consistent with the Commission's Order No. 431,[2] El Paso filed proposed

[2] "In April 1971 the Federal Power Commission (FPC) promulgated its Order 431 requiring every jurisdictional pipeline to report to FPC whether curtailment of its deliveries to customers would be necessary because of inadequate supply of natural gas. A pipeline anticipating the necessity for curtailment was required to file a revised tariff to control deliveries to all customers – industrial 'direct sales' customers, purchasing gas for their own consumption, and 'resale' customers, purchasing gas for distribution to ultimate consumers." ***Federal Power Commission*** v. ***Louisiana Power & Light Co., infra,*** at 406 US 621, 623.

tariff modifications on July 6, 1971, incorporating new curtailment provisions to cope with such supply deficiencies (R. 11406). In support of its proposed tariff revisions, El Paso alleged that under its interpretation of the then-existing tariff provisions – an interpretation apparently fully cognizant of its liability under such tariff for failure to deliver to the California distributors – that the east-of-California customers alone would bear the full burden of the first substantial curtailment to be experienced on its system, and its proposed modifications would eliminate such disastrously discriminatory result.

On August 17, 1972, after the conclusion of lengthy hearings before an administrative law judge on the proposed tariff revisions, but prior to the issuance of an initial decision by the judge, El Paso informed the Commission that its latest supply forecasts revealed that curtailments in the magnitude of 250,000 Mcf on the average day would commence by November 1972, rather than November 1973, as originally projected (R. 11940). Moreover, El Paso informed the Commission that it was unwilling to incur the risk of liability which might flow from implementing, prior to a Commission determination as to the justness and reasonableness of such, either (1) its proposed tariff revisions or (2) its interpretation of the curtailment provisions of its then-existing tariff (R. 11933-11938). Accordingly, El Paso requested that the Commission exercise its emergency authority under Section 5(a) of the Natural Gas Act to provide interim procedures to govern the administration of curtailment pending decision upon the appropriate permanent program (R. 1938-1944).

On October 31, 1972, the Commission issued its Opinion No. 634 (R. 13355-13368). Such opinion found that El Paso's interpretation of its then-existing tariff provisions, which placed all of such curtailment on the east-of-California customers, was an obvious violation of the basic protection against discrimination afforded by the Natural Gas Act (R. 13362). Faced with the impending onslaught of curtailment, the Commission prescribed interim emergency priorities and procedures providing for the ratable curtailment of all service

rendered by El Paso according to an order of end-use priorities. Pursuant to such order, all large boiler fuel end-use requirements with alternate fuel facilities were to be curtailed first, thereafter small boiler fuel requirements and other industrial requirements were to be curtailed as necessary, with small commercial and residential requirements the last to be reached by curtailment (R. 13367).

After the Commission denied rehearing of such decision (R. 13747-13754), the California distributors and other parties initiated review proceedings in the U.S. Court of Appeals for the District of Columbia Circuit. The California petitioners' principal contention was that the Commission's jurisdiction over curtailment during the interim period was limited to insuring adequate service to the east-of-California residential and commercial users, but that such curtailment jurisdiction did not extend to correcting the discrimination between the two region's industrial users.

While remanding certain aspects of the interim emergency orders, the Court of Appeals upheld the Commission's determination that El Paso's interpretation of its then-existing tariff provisions would result in gross discrimination against end-users in the east-of-California region, and that, to the extent that such interpretation was properly based on El Paso's then-existing tariff and contracts, the Commission may override such contractual provisions with a plan based upon the ratable curtailment of all end-uses.

## REASONS FOR DENYING THE WRITS

As shown below, the reasons for denying the writs are twofold: (1) the issues raised by the petitioners are, or will be shortly, moot, and (2) the decision below is clearly correct.

## I

## THE ISSUES RAISED ARE MOOT

On June 14, 1974, the Commission issued its Opinion No. 697 prescribing permanent curtailment priorities and procedures to supersede the interim emergency orders involved herein, to be effective "within 60 days after its issuance, or, in the event applications for rehearing are filed, upon the date of a final order on rehearing in this proceeding, whichever is the later." (Mimeo, p. 35). Assuming that the issues raised by the petitioners are worthy of this Court's attention, such issues should be assessed in the context of the Commission's fully considered decision as to the appropriate permanent curtailment procedures, rather than on the basis of stop-gap interim emergency orders which have been, or shortly will be, superseded. The petitions, therefore, should be denied.

## II

## THE DECISION BELOW IS CLEARLY CORRECT

The decision below represents a straightforward application of this Court's holding in ***Federal Power Commission v. Louisiana Power & Light Company***, 406 U.S. 621 (1972). ***LP&L*** found that the Commission has comprehensive and all-pervasive authority under its Section 1(b) transportation jurisdiction to fully regulate the conduct of curtailment of interstate natural gas service. This Court found, further, that such plenary authority to prescribe uniform curtailment priorities and procedures is not fettered by contractual curtailment provisions negotiated by private parties, but is exercised according to public interest standards, 406 U.S. 621, 642-643:

> "The substantive standard governing FPC evaluation of curtailment plans is found in § 4(b) of the Act:

> 'No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.' 15 USC §717c."

***LP&L*** further found that the substantially similar provisions of Section 5(a), under which the instant controversy arises, provides a second procedural mechanism to enforce the Natural Gas Act's sanctions against preference, ***Ibid.*** Thus constituted, "[t]he Natural Gas Act of 1938 granted FPC broad powers 'to protect consumers against exploitation at the hands of natural gas companies.' "

The controversy involved herein provides a classic demonstration of why Sections 4(b) and 5(a) provide the standard for curtailments rather than agreements between private parties. By conferring on El Paso's interpretation of its previously-existing tariffs the status of express contract provisions, the California distributors contend that they have obtained from El Paso a "contract right" to exemption from curtailment, while the east-of-California purchasers have not obtained such "contract right". The California petitioners concede, however, that to exempt all service to California from curtailment while curtailing residential and commercial requirements east-of-California would be grossly discriminatory. But such California distributors see no discrimination in an allegedly contract-based curtailment program which would curtail ***all*** industries dependent upon natural gas in the east-of-California region prior to curtailing ***any*** industrial service rendered to the California distributors. Thus, although El Paso commenced full requirements service to the east-of-California region some 15 years before commencing service to California. Two of the largest utilities

in the United States are here seriously suggesting that their private party agreements purchased an exemption from curtailment, thereby demoting the antecedent full requirements service to the east-of-California region to a curtailment status subservient to their own. No greater example could be found of the economic bludgeoning that the public interest provisions of Sections 4(b) and 5(a) were designed to prevent.

The short answer to the California petitioners' claim of preference is that Sections 4(b) and 5(a) prohibit preferential or discriminatory practices irrespective of whether the service involved is for residential, commercial, or industrial purposes. There is nothing within the plain terms of such Sections, the legislative history thereof, or this Court's holding in ***LP&L*** to suggest that the Commission's mandate "to protect consumers against exploitation" does not apply equally to all classes of service. See ***Granite City Steel Co.*** v. ***Federal Power Commission,*** 320 F.2d 711 (1963).

In recognition, perhaps, that the sanctions against undue preference or discrimination apply equally to service rendered to industrial requirements, the California petitioners assert that, if discriminatory, their claimed contractual right of exemption is not unduly so. In support of such contention, the California distributors point to the provisions for a minimum annual bill and for a rate incentive in the rate schedule under which El Paso renders their service, and assert that such provisions are obligations not assumed by the east-of-California parties. Such "obligations", however, do not justify exemption from curtailment. The minimum annual bill is a provision commonly assumed by virtually all interstate pipelines' major customers in order to assure the financibility of major expansions of facilities. Since the financial feasibility of the enormous expansion of El Paso's system was based on the assumption that the two new customers would purchase 80% of such dramatically expanded annual throughput, it is hardly unreasonable that a condition for financing such

expansion would include the assumption of a minimum annual bill by such distributors. As for the rate incentive, such "obligation" has historically enabled the California distributors to purchase from El Paso at a lower unit price than that paid by distributors in Arizona. Hence, neither of such items can be seriously claimed as burdensome obligations, much less as justification for the extraordinary preference claimed.

In sum, the decision below properly upheld the Commission's determination that all customers served by El Paso had the expectation of firm service, and that the consequence of the failure of El Paso's supplies must be apportioned ratably to the end-use requirements served by all customers of El Paso. Since such decision is based on the plain terms of the Natural Gas Act and this Court's interpretation thereof, the decision below is clearly correct.[3]

## CONCLUSION

The petition for a writ of certiorari should be denied.

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[3]Petitioners, Pacific Gas and Electric Company and San Diego Gas and Electric Company, raise subsidiary issues relating to (1) a claimed conflict between the decision below and the Fifth Circuit's decision in ***International Paper Company*** v. ***Federal Power Commission,*** 476 F.2d 121 (1973), and (2) a claimed violation of the National Environmental Policy Act (NEPA), 42 U.S.C. 4321, ***et seq.*** In both instances, the Court below fully discussed and properly dismissed such arguments as make-weight.

First, there clearly exists no conflict between the decision below and the Fifth Circuit's decision in ***International Paper,*** as is set forth in detail in the decision below (Appendix A to the petition of Pacific Gas and Electric Company, pp. 18-19). The Fifth Circuit expressly acknowledged the Commission's plenary authority to override contractually based curtailment provisions upon a showing that such

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provisions were discriminatory. What *International Paper* did contest was a matter falling outside of the Commission's curtailment jurisdiction; i.e., "whether or not an FPC curtailment order alone will serve to insulate a pipeline unable to meet contractual commitments from liability for this failure." 476 F.2d 121, 123. It was solely with respect to "'*damages* in the public interest', not '*curtailment* in the public interest'" that the Fifth Circuit held a finding of unequivocal public necessity to be a prerequisite for the abrogation of contractual provisions. 476 F.2d 121, 129, (emphasis in original).

Second, with respect to the claimed violation of NEPA, the decision below correctly found that the Commission's obligation to comply "to the fullest extent possible" with NEPA's procedural obligations, means compliance unless such compliance would give rise to a violation of the Commission's statutory obligations (Appendix A to the petition of Pacific Gas and Electric Company, pp. 47-48). In

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this instance, the Court below properly held that the Commission, in the very compressed time span between hearing and decision, had a clear statutory duty to take effective interim action to prevent gross discrimination among customers. Hence, such statutory conflict properly excused compliance with NEPA's procedural requirements until the issuance of the permanent plan. (See: ***Atlantic Gas Light Company*** v. ***FPC***, 476 F.2d 142 (5th Cir. 1973).

# In the Supreme Court of the United States

OCTOBER TERM, 1974

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Nos. 73-1772, 73-1776, 73-1790, 73-1825

SOUTHERN CALIFORNIA GAS COMPANY, ET AL.,
PETITIONERS

*v.*

FEDERAL POWER COMMISSION

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*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## MEMORANDUM FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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Petitioners [1] challenge the validity of orders of the Federal Power Commission (Pet. App. 54-69) [2] es-

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[1] The petitions in Nos. 73-1790 and 73-1825 were filed out of time. The judgment of the court of appeals was entered on January 21, 1974. Petitions for rehearing were denied on February 25, 1974. The time within which to file a petition for a writ of certiorari expired on May 26, 1974, and no extensions were granted. (May 26 was a Sunday, and May 27 was a legal holiday.) The petition in No. 73-1790 was filed on May 29, 1974, and the petition in No. 73-1825 was filed on June 3, 1974. This Court therefore lacks jurisdiction over those petitions (28 U.S.C. 2101(c)). We accordingly address ourselves in this response only to the contentions of the petitioners in Nos. 73-1772 and 73-1776.

[2] "Pet. App." refers to the appendix to the petition of Southern California Gas Company, No. 73-1772.

tablishing an interim plan, pending further proceedings to establish a permanent plan, for the curtailment of natural gas deliveries, during periods of shortage, to customers of El Paso Natural Gas Company, a large interstate pipeline. The court of appeals, in an opinion that fully and accurately states the facts and background of the case, affirmed the orders in part but remanded the case to the Commission for further consideration with respect to several matters (Pet. App. 1-53). The interim plan has thus not yet been finally approved by the court of appeals. The plan will, in any event, soon be superseded by the permanent plan, which was prescribed by the Commission on June 14, 1974.[3]

The Commision's interim plan established a schedule of priorities for allocating gas supplies when El Paso's deliveries must be curtailed. Those priorities were defined in terms of the "end use" of the gas to be delivered—*i.e.*, whether the gas was destined for residential, commercial, or industrial consumption. Petitioners Southern California Gas Company (SoCal) and Pacific Gas and Electric Company (PG & E), both California distributor-customers of El

[3] The Commission's opinion and order prescribing a permanent curtailment plan are set forth in the appendix to Southern California's reply brief (No. 73-1772), pp. 1-54. The permanent plan will take effect, according to the terms of the order, upon the issuance of a final order on the petitions for rehearing presently pending before the Commission (*id.* at 43).

The opinion on the permanent plan also constitutes the Commission's opinion on remand with respect to the interim plan (*id.* at 8-9).

Paso, contend that the interim plan unjustifiably interfered with their contractual rights to purchase gas from El Paso and improperly "shifted" gas supplies from one group of customers to another.

This Court rejected similar contentions in *Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621. The Court held in that case that the Commission "may order pipelines facing shortages to develop and submit rational curtailment arrangements" and may permit "the pipeline's tariff amendments to take effect despite contrary terms in existing contracts" (406 U.S. at 646). The Court also made clear that "the Commission would have emergency authority to issue interim orders effecting a curtailment plan" (*id.* at 644, n. 18).

Contrary to petitioners' assertions, nothing in the Court's opinion suggests that the Commission's emergency authority to prescribe a curtailment plan is limited to providing for "the demands of human-needs customers" (SoCal Pet. 11). Where the Commission finds that a pipeline's existing tariffs are discriminatory, it is obliged to prescribe just and reasonable tariffs to eliminate *all* aspects of the discrimination. The Commission here found that, under El Paso's existing tariffs, service to all of its residential, commercial, *and* industrial customers located east of California would be curtailed before *any* service to California customers would be curtailed. It accordingly found the plan to be "discriminatory and violative of Section 4(b) of the Natural Gas Act" (Pet. App. 60).

In eliminating that discrimination, the Commission reasonably concluded that, in a time of severe natural gas shortage, the contractual expectations of *all* users are necessarily frustrated and that the resulting burden should be spread as equitably as possible (see Pet. App. 17-18). An "end use" plan which fairly allocates the available supply among the ultimate users of the gas is not invalid merely because one or another distributor receives less gas than its contract with the pipeline might call for in a period of relatively plentiful supply. As the court of appeals correctly stated, "the Commission is not bound by agreements among parties subject to its jurisdiction" (*id.* at 18) where the result would be unduly discriminatory.

Petitioner PG & E, relying on the decision in *International Paper Co.* v. *Federal Power Commission*, 476 F. 2d 121 (C.A. 5), argues (Pet. 10-12) that the Commission failed to make essential threshold findings to justify its conclusions that allocating gas in accordance with existing tariffs would be unduly discriminatory and that requiring the pipeline to allocate gas without regard to contractual preferences would be in the public interest. As the court of appeals correctly stated, however, *International Paper* is inapposite.

> [T]he twin findings mentioned in the *International Paper* opinion are only required for the purpose of exonerating a pipe line from liability for breaches of contract which may result from compliance with Commission orders. The peti-

> tions now before us do not concern the remedial rights of the pipe line and its customers *inter sese*, but the authority of the Commission to override a contractually arranged curtailment plan. On the latter question, the statute leaves no doubt. The only preliminary finding required by the statute is that the former plan was discriminatory, a finding clearly expressed in Opinion 634. [Pet. App. 20; footnote omitted.]

Petitioner SoCal also claims that "[t]he Commission had no substantial evidence upon which it could conclude that there was any real danger to the residential and commercial customers east of California" (Pet. 17). The court of appeals found, however, that "the Commission's prediction of severe [east-of-California] curtailments under the former plan is supported by substantial evidence" (Pet. App. 28) and that "the evidence does sustain the conclusion that peak day curtailment would, at minimum, cause the complete shutdown of [east-of-California] direct industrials and substantial reduction of service to [east-of-California] commercial customers while California service remained undisturbed" (*id.* at 29).[4] Petitioner has not shown that the court of

[4] At the same time, the court found that the record did not support a finding that east-of-California *residential* customers would have suffered curtailment under the former plan. It accordingly authorized the Commission on remand "to modify its orders accordingly, subject to further review by this Court" (Pet. App. 29). We assume, therefore, that petitioner PG & E's present claim relates only to the Commission's findings concerning commercial customers.

appeals "misapprehended or grossly misapplied" the substantial evidence standard. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491; *Mobil Oil Corp.* v. *Federal Power Commission*, No. 73-437, decided June 10, 1974, slip op. 23.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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